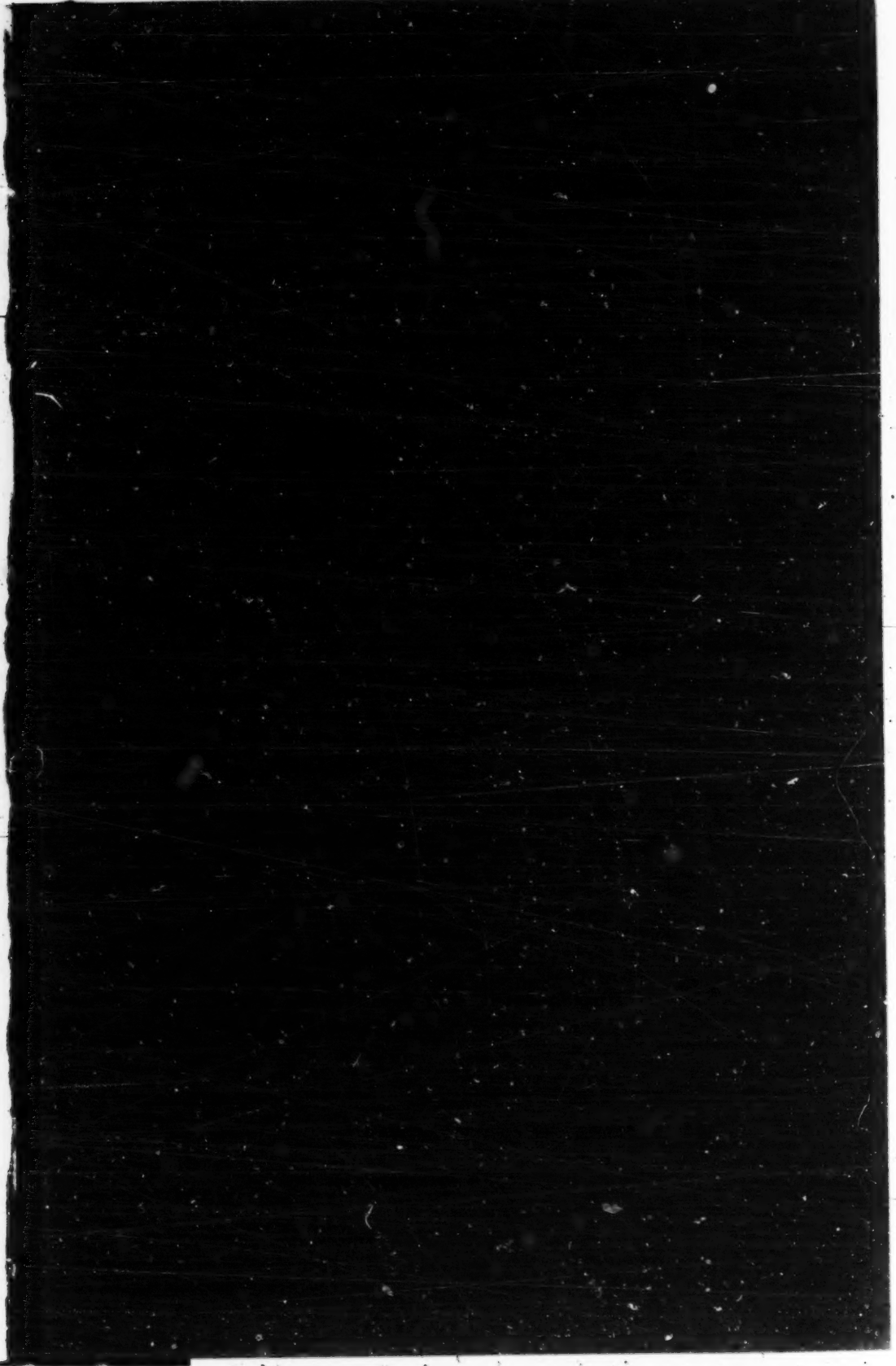

INDEX.

APPENDIX TO APPELLANT'S BRIEF.

Appendix A.

Docket Entries.

(1)*

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Civil 2103.

UNITED STATES OF AMERICA for the use and benefit of CALVIN TOMPKINS COMPANY,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY.

1942

Apr. 4 Complaint filed.

4 Summons issued.

14 Summons returned, served on Clifford F. MacEvoy Co. by serving Vice President on April 8th and on Commissioner of Banking and Insurance on April 6th, filed.

25 Notice of motion for order dismissing action and affidavit filed.

25 Affidavit of service filed.

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* Parenthetical references are to page numbers of the transcript of record.

Docket Entries.

May	4	Order adjourning motion filed (May 11).
	11	Stipulation adjourning motion filed (May 18).
	18	Hearing on motion for order dismissing action. Decision reserved. Briefs to be submitted (Fake).
1943		
Mar.	17	Memorandum filed (Case to be dismissed with costs) (Fake).
Apr.	5	Order of dismissal with costs to defendant filed.
	5	Judgment for costs in favor of defendants, entered (Notice sent attorneys).
	13	Defendant's costs taxed at $20.00 filed.
	22	Notice of Appeal filed.
	22	Bond on Appeal filed.
	22	Designation of Record on Appeal filed.

Complaint.

(2)

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

United States of America for the use and benefit of The Calvin Tomkins Company for its complaint alleges:

1. The Calvin Tomkins Company is a corporation organized and existing under the laws of the State of New York.

2. Defendant Clifford F. MacEvoy Company is a corporation organized and existing under the laws of the State of New Jersey.

3. Defendant The Aetna Casualty and Surety Company is a corporation organized and existing under the laws of the State of Connecticut.

4. On or about the third day of June, 1941 the United States of America represented by the Federal Works Administrator and defendant Clifford F. MacEvoy Company duly entered into a written contract dated as of the said day, wherein and whereby defendant Clifford F. MacEvoy Company for a valuable consideration, agreed to furnish the materials and perform the work necessary for the construction of seven hundred dwelling-units on the site of the Government's Defense Housing Project

NJ-28071 located in the Township of Clark and in the City of Linden, Union County, New Jersey, on a cost plus a fixed fee basis; for a further description of the said

(3)

contract reference is hereby made to the said contract now on file in the General Accounting Office of the United States of America, which said contract is incorporated herein by reference thereto.

5. Pursuant to the act of Congress approved August 24, 1935, 49 Stat. 793, 794, 40 USCA 270a, 270b, defendant Clifford F. MacEvoy Company, as principal, and defendant The Aetna Casualty and Surety Company, as surety, on or about the 22nd day of May, 1941 duly executed a bond to the United States of America wherein and whereby defendant Clifford F. MacEvoy Company, as principal, and defendant The Aetna Casualty and Surety Company, as surety, bound themselves, jointly and severally, in the amount of one million dollars, the condition of the said bond being that defendant Clifford F. MacEvoy Company, as principal, shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the aforesaid contract and any and all duly authorized modifications of said contract; for a further description of the said bond reference is hereby made to the said bond now on file in the General Accounting Office of the United States of America, which said bond is incorporated herein by reference thereto.

6. The said bond was duly accepted by the United States of America and upon such acceptance the aforesaid contract for the construction of the said seven hundred dwelling-units was awarded to defendant Clifford F. MacEvoy Company.

7. By reason of the foregoing defendant Clifford F. MacEvoy, as principal, and defendant The Aetna Casualty

and Surety Company, as surety, had imposed upon them, jointly and severally, the liability, among other things, of seeing that prompt payment was made by defendant Clifford F. MacEvoy Company to corporations furnishing materials in the prosecution of the work provided for in

(4)

the aforesaid contract.

8. Defendant Clifford F. MacEvoy thereafter contracted with James H. Miller & Company for the furnishing of building materials by James H. Miller & Company for the prosecution of the work provided for in the aforesaid contract between the United States of America and defendant Clifford F. MacEvoy Company.

9. Between on or about the 30th day of June, 1941 and on or about the 12th day of November, 1941, The Calvin Tomkins Company at the special instance and request of James H. Miller & Company duly furnished and supplied to James H. Miller & Company building materials at the agreed price and of the reasonable value of $47,119.14 payable on the 10th day after the half-month during which it was delivered, all of which was due on or before the 25th day of November, 1941; no part of said sum has been paid, except the sum of $35,085.65, and the amount due and owing by James H. Miller & Company to The Calvin Tomkins Company for the said materials is the sum of $12,033.49 with interest from the respective due dates.

10. The materials furnished and supplied by The Calvin Tomkins Company to James H. Miller & Company as aforesaid were furnished in the prosecution of the said work provided for in the aforesaid contract between United States of America and defendant Clifford F. MacEvoy Company.

11. The materials furnished and supplied by The Calvin Tomkins Company to James H. Miller & Company as aforesaid were furnished in the prosecution of the aforesaid work with the knowledge, consent and approval of defendant Clifford F. MacEvoy.

12. Within ninety days from the date on which The Calvin Tomkins Company furnished the last of the aforementioned material to James H. Miller & Company and on the 6th day of January, 1942, The Calvin Tom-

kins Company duly gave written notice to defendant Clifford F. MacEvoy Company and defendant The Aetna Casualty and Surety Company of the amount of its claim for unpaid materials furnished by it as aforesaid, which said notice stated that the materials had been furnished to James H. Miller & Company.

13. The aforesaid contract between the United States of America and defendant Clifford F. MacEvoy Company was to be performed and executed in the district of New Jersey.

14. One year has not elapsed from the date of final settlement of the aforesaid contract between the United States of America and defendant Clifford F. MacEvoy Company.

WHEREFORE, the United States of America for the use and benefit of The Calvin Tomkins Company demands judgment against defendants in the sum of $12,033.49 with interest and costs.

BENJAMIN P. DEWITT,
Attorney for Plaintiff,
423 Center Street,
South Orange,
New Jersey.

Defendants' Motion to Dismiss Complaint.

(6)

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

Civil Action File No. 2103.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

Sir:

PLEASE TAKE NOTICE, that upon the summons and complaint herein, the undersigned will move this Court at the Federal Building, Federal Square, in the City of Newark, New Jersey, on the 4th day of May, 1942, at ten-thirty o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the above action on the ground that the plaintiff fails to state a claim against the defendants upon which relief can be granted, and for such other and further relief as to the Court may seem just in the premises.

ELMER Q. GOODWIN,
507 Orange Street,
Newark, New Jersey,
Attorney for Defendants,
Clifford F. MacEvoy Company
and
The Aetna Casualty and Surety
Company.

To:

BENJAMIN P. DEWITT, ESQ.,
Attorney for Plaintiff,
423 Center Street,
South Orange, New Jersey.

Memorandum.

(9)

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

Civil Action #2103.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

APPEARANCES:

BENJAMIN P. DEWITT, ESQ., Attorney for Plaintiff.

ELMER O. GOODWIN, ESQ., Attorney for Defendants.

FAKE, *District Judge*:

The issues here arise on motion to dismiss the complaint on the ground that it fails to state a valid cause of action.

It appears upon the face of the complaint herein that the MacEvoy Company entered into a contract with the Federal Works Administrator under the terms of which the MacEvoy Company was to furnish materials for and construct seven hundred dwelling units known as the Government's Housing Project N. J. 28071. Thereafter the MacEvoy Company as principal and Aetna Casualty

and Surety Company as surety entered into a bond in the amount of a million dollars conditioned to "promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the aforesaid contract" pursuant to Statute 40 U. S. C. A. 270a, 270b.

(10)

Thereafter the MacEvoy Company contracted with the Miller Company for the furnishing of building material by the Miller Company for the prosecution of the work covered by the aforesaid contract, and further thereafter the Tomkins Company, plaintiff herein "at the special instance and request of the Miller Company duly furnished and supplied to the Miller Company building materials at the agreed price and of the reasonable value of $47,119.14" on which a balance of $12,033.49 remains unpaid. These materials were delivered on the job by the plaintiff and used in the performance of the contract between the Federal Works Administrator and the MacEvoy Company and as alleged: "with the knowledge and consent of the MacEvoy Company". The Statute involved reads as follows:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the

sum or sums justly due him: PROVIDED, HOWEVER, *That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond* upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons." 270b. Title 40 U. S. C. A. (italics supplied).

A question arises as to whether on the face of the

complaint the plaintiff is shown to have any direct contractual relationship with a subcontractor. This leads to a further question. Was the materialman Miller a subcontractor within the meaning and intent of the statute? It is noted that the Heard Act, 40 U. S. C. A. 270, which preceded the Miller Act above quoted, contained no proviso such as that italicized above. The construction therefore placed on the Heard Act by the courts in the cases next below cited must be read in the light of the absence

of the proviso and when so considered they afford little if any assistance in answering the questions above propounded. See *U. S. Use of Hill* v. *American Surety Company of N. Y.*, 200 U. S. 197, 50 L. Ed. 437; *Continental Casualty Co.* v. *North American Cement Corporation*, 91 Fed. 2nd 307; and *Utah Const. Co., et al.* v. *U. S.*, 15 Fed. 2nd 21.

The proviso in the Miller Act lies at the base of the plaintiff's right of recovery in the instant case. If it appears that the materialman Miller, to whom plaintiff furnished materials, comes within the meaning and intent of the word, subcontractor, then plaintiff has a contract with a subcontractor since it appears that he furnished materials to Miller under an agreement so to do.

Bearing in mind that the word, subcontractor, appears here in a statute intended to function in the sphere of building construction in which sphere the mechanic's lien laws of the several states have long been operative and it further appearing that there are no Federal cases construing the word as used in the Miller Act, it is well to look to the meaning of the word as generally understood in the building trade and adopted by the state courts. Of course in its broader and more comprehensive sense it would seem to include anyone who furnishes either labor or material on the job when a contract express or implied can be spelled out. But as we shall see, such an all-inclusive interpretation cannot be accepted in the light of its usage in the trade or in its

interpretation by many of the state courts. However an examination of the cases cited in Words & Phrases under, subcontractor, and those appearing in the same work under, materialman, leave the searcher after truth in a state of unhappy confusion. For example, in *Beckhard* v. *Rudolph, et al.*, 68 N. J. Eq. 315, 59 Atl. 253,

the late Vice Chancellor Stevenson considering the New Jersey Mechanic's Lien law said; "A lien is given to a materialman—to a man who has furnished materials * * *. If his charge is for materials alone, then he is a materialman. If his charge is for work and labor in putting the materials in the building, then he is a contractor for the erection of the building. He is not a materialman. He never is described as such * * *. If a man makes a contract to supply material, and by his labor incorporate that material into the building, he is not a materialman, in my judgment;". This case went up on appeal to the Court of Errors and Appeals, 68 N. J. Eq. 740, 63 Atl. 705, and Mr. Justice Pitney then of that court said in the opinion reversing the Vice Chancellor: "The learned Vice Chancellor rejected the suggestion that the words 'any person who may have furnished materials used in the erection of any such house or other building', might be deemed to cover the case of a plumber who furnishes fixtures set up and installed in the building, including as well the cost of the work of installation as the cost of the fixtures themselves; deeming that the force of the word 'materialman' as used in the latter part of the section prevented the adoption of such a construction, and that this term as used in the section practically means one who has furnished materials only; * * *. In our opinion this is too narrow a reading of the letter of the section, and fails to give due effect to the spirit of the act * * *". Thus it appears that the court of last resort in New Jersey has ruled under the peculiar provisions of the

New Jersey Act that the word "materialman" includes one who contracted to furnish and install material. A year later the same rule was followed in *McNab & Harlin Mfg. Co.* v. *Paterson Bldg. Co.*, 72 N. J. Eq. 929, 67

Atl. 103. To this limited extent then and to such extent only do we find the word, contractor, and the word, materialman, combined and interwoven as one by judicial interpretation. It should be emphasized that these New Jersey decisions are influenced largely by the letter and spirit of the New Jersey Act. They are considered here primarily to point out the elusive problem presented by the instant case.

In *Northwest Roads Co., et al.* v. *Clyde Equipment Co.*, 79 Fed. 2nd 771, the Circuit Court of Appeals of the Ninth Circuit considered a state statute which provided for a payment bond to cover "any person or persons performing such services or furnishing material to any subcontractor" and in the course of the opinion said: "as we view it, the only materialman who can successfully maintain an action under the statute is one who furnishes supplies or materials to a contractor or a subcontractor. *Neary* v. *Puget Sound Engineering Co.*, 114 Wash. 1, 194 P. 830, is conclusive to the effect that a claim for services rendered to a mere materialman is beyond the protection of the statute. By the only reasoning available to us because of that holding, we must also say that a claim for materials furnished to a mere materialman is likewise without the provisions of the statute." The foregoing is, I think, the more reasonable view to take in the instant case. I am not unmindful however of the many citations which appear in the published compendiums bearing upon the words, contractor, subcontractor and materialman. These cases for the most part, draw their inspiration from state statutes which are not fully comparable with the statute involved here and I have chosen the case last above cited

because, while a state statute is involved there, it is more closely akin to our immediate statute than any I have

found. Moreover I fully agree with the late Vice Chancellor Stevenson that a materialman and a contractor are not synonymous terms in the building trades. It follows that the plaintiff herein, being a mere materialman who furnished material to another materialman who in turn had a contract with the contractor, does not fall within the benefits afforded by the statute.

The fact that the plaintiff furnished the material as alleged, with the knowledge and consent of the principal contractor, does not result in spelling out an implied contract with the principal contractor since plaintiff was already under a contract with the materialman Miller to furnish them.

An order will be entered dismissing the complaint with costs to be taxed.

Order and Decree.

(15)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Civil Action #2103.

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN-TOMKINS COMPANY,

Plaintiff,

AGAINST

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

This matter being opened to the Court by Elmer O. Goodwin, Esq., Attorney for the defendants herein, on Motion to Dismiss the complaint on the ground that it fails to state a valid cause of action; and the Court having considered argument of counsel and the briefs filed herein, and being satisfied as to the sufficiency of the defendants' application, it is thereupon on motion of the said Elmer O. Goodwin, Esq., on this 5th day of April, A. D. 1943.

ORDERED, ADJUDGED AND DECREED, that the complaint filed herein be and the same is hereby dismissed with costs to be taxed.

It is so ordered,

GUY L. FAKE,
U. S. D. J.

APPENDIX TO APPELLEE'S BRIEF.

Appendix "A".

Form of Bond.

U. S. Standard Form No. 25-A
Approved by the Secretary
of the Treasury
Sept. 16, 1935

PAYMENT BOND

(Construction.)

Pursuant to the Act of Congress, Approved August 24, 1935
(49 Stat. 793; 40 U. S. Code Sec. 270a)

---

38 S 6346

KNOW ALL MEN BY THESE PRESENTS, That we, CLIFFORD F. MACEVOY COMPANY, a corporation of the State of New Jersey as Principal, and THE AETNA CASUALTY AND SURETY COMPANY, a corporation of the State of Connecticut, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of ONE MILLION AND NO/100 ($1,000,000.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated May 22, 1941, for Construction of 700 dwelling units for Defense Housing Project, N. J. 28071, Township of Clark and City of Linden, Union County, New Jersey.

Form of Bond.

Now, THEREFORE, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals this 22nd day of May, 1941, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

CLIFFORD F. MacEVOY COMPANY
(Corporate principal)
405 Seventh Avenue, Newark, N. J.
By CLIFFORD F. MacEVOY (President)

Attest:

MILDRED WAKEFIELD
(Assistant Secretary)

THE AETNA CASUALTY AND SURETY COMPANY
(Corporate surety)
1180 Raymond Boulevard, Newark, N. J.
By Resident Vice President (S. M. WILLIAMS, JR.)

Attest:

Resident Assistant Secretary
(M. LEBLANC)

Premium included in charge on
The rate of premium on this bond is.....per thousand.
Performance bond

Total amount of premium charged, $.....

Appendix "B".

Affidavit of Mildred Wakefield as to Payment for Materials.

AFFIDAVIT.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action File No. 2103.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Plaintiff,

—against—

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

State of New Jersey,
County of Essex—ss.:

MILDRED WAKEFIELD, being duly sworn according to law on her oath, deposes and says that:

1. I am employed as an accountant for Clifford F. MacEvoy Company and was so employed during the dates mentioned in the complaint filed in the above cause.

2. I state and aver that Clifford F. MacEvoy Company made payment in full to James H. Miller Co. for all materials and supplies furnished Clifford F. MacEvoy Company in the progress of the construction of seven hundred (700) defense housing units at Winfield, New

Affidavit of Mildred Wakefield as to Payment for Materials.

Jersey. The following is a schedule of all the payments made by Clifford F. MacEvoy Company to the said James H. Miller Co.:

1941			
July	10	$	122.89
"	10		184.33
"	22		1,128.53
"	30		3,207.38
August	6		2,192.79
"	18		6,645.76
September	17		4,211.10
October	2		14,390.92
"	2		125.67
"	16		3,098.51
"	23		14,936.99
November	5		4,106.62
1942			
January	22		311.69
"	22		78.27

3. Clifford F. MacEvoy Company is not indebted to the said James H. Miller Co. in any amount.

MILDRED WAKEFIELD.

Subscribed and sworn to before me
this 24th day of April, 1942.

ANNA M. SCHOECK
Notary Public of New Jersey
My Commission Expires Sept 15, 1946

Order Assigning Hon. Armistead M. Dobie for Argument.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of CALVIN TOMKINS COMPANY,

Plaintiff-Appellant,

vs.

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

Appeal from the District Court of the United States for the District of New Jersey.

And now, to-wit: this 8th day of July A. D. 1943, it is ordered that Hon. Armistead M. Dobie, United States Circuit Judge for the Fourth Circuit, be and he is hereby assigned to sit in above case in order to make a full court.

JONES,
Circuit Judge.

Endorsements—

Order Assigning Hon. Armistead M. Dobie for Argument
Received & Filed July 8, 1943
WM. P. ROWLAND, Clerk

Decision.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MacEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

And afterwards, to wit, the 8th day of July, 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Charles Alvin Jones, Honorable Armistead M. Dobie and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 13th day of August, 1943, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

Decision.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant;

vs.

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

APPEAL FROM AN ORDER AND DECREE OF UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

OPINION.

(Filed August 13, 1943)

Before JONES, DOBIE and GOODRICH, *Circuit Judges.*

DOBIE, *Circuit Judge*:

This is an action on a payment bond given pursuant to the Miller Act, 49 Stat. 793, 40 U.S.C.A. §270a, brought by the use-plaintiff, The Calvin Tomkins Company, hereinafter called plaintiff, in the United States District Court for the District of New Jersey, against the Clifford F. MacEvoy Company, hereinafter called defendant, and The Aetna Casualty and Surety Company, hereinafter called surety.

On June 3, 1941, the defendant entered into a contract with the United States of America, in which the defend-

ant agreed to furnish the materials and perform the work necessary for the construction of a defense housing project near Linden, New Jersey. Pursuant to the Miller Act, defendant and surety executed a bond on United States Form No. 25-A, in the sum of one million dollars, conditioned on the prompt payment of the claims of all persons supplying labor and material in the prosecution of the work specified in defendant's contract.

Defendant thereafter contracted with the James H. Miller Company, hereinafter called Miller Company, for the furnishing of wall-board building materials by it to defendant for use in the housing project. Miller Company then in turn contracted with plaintiff, which, with the knowledge, consent and approval of defendant, furnished $47,119.14 worth of building materials through Miller Company to be used by defendant on the project.

Plaintiff, which had not been paid in full by Miller Company for the goods supplied, instituted the present action against defendant and surety on the bond in order to recover the unpaid balance of $12,033.49 due it. The trial court dismissed plaintiff's complaint on the ground that it failed to state a valid cause of action. Plaintiff has duly appealed to this Court. The cardinal question presented for our consideration is whether the Miller Act subjects a government contractor (defendant) and his surety to liability under a payment bond, to a third person (plaintiff) who has furnished material to a materialman (Miller Company), in the absence of any contractual relationship between this third person (plaintiff) and any subcontractor, when the term "sub-contractor" is used in a narrow, technical sense to distinguish this term from the term "materialman".

Apparently, the question is one of first impression since our independent research and that of both counsel have failed to unearth any similar situations passed upon by either the Supreme Court or any Circuit Court of Appeals. Accordingly, we shall scrutinize with great care the

exact terminology and legislative history of the Miller Act. We shall also examine and apply the relevant decisions under the Heard Act which antedated, and has been repealed by, the Miller Act.

At the threshold, we notice that no mention is made of contractors or subcontractors in the title of the Miller Act. A statement is merely made to the effect that the bond is "for the protection of persons furnishing material and labor for the construction, alteration or repair of said public building or public work."

The first section of the Act then goes on to provide that the bond is "for the protection of *all* persons supplying labor and material in the prosecution of the work provided for in said contract for the use of *each* such person." (Italics ours.) Section two continues, in part, "*Every* person who has furnished labor or material in the prosecution of the work provided for in such contract * * * *shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid* * * * *or sums justly due him.*" (Italics ours.)

Section three then stipulates that *any* person who has supplied labor or material for such work and who has not been paid may, upon making an affidavit to that effect, obtain a certified copy of the bond of the contractor and the contract for which the bond was given. Section four merely defines certain terms in the Act and the last section provides for the repeal of the Heard Act.

Thus, the only limitation placed upon admission to the class of persons who may recover on the contractor's bond in the Act itself is that they must have "furnished labor or material in the prosecution of the work." Surely plaintiff's credentials as presented in its complaint entitle it to the protection of the Act within a literal reading of the statute.

Moreover, the condition of the very bond in question which was furnished by defendant pursuant to the Miller Act states that defendant as "principal shall promptly make payment to *all persons supplying labor and material*

in the prosecution of the work provided for in said contract." (Italics ours.) Thus the only restriction or qualification in the bond itself, as in the Act, is that the person seeking a recovery must have supplied labor or material for the project.

We are unable to rest here, however, for section two of the Miller Act also contains the following language:

> "*Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons."

The District Court concluded that in the light of this provision, "the plaintiff herein, being a mere materialman who furnished material to another materialman who in turn had a contract with the contractor, does not fall within the benefits afforded by the statute." Consequently, the plaintiff's complaint was dismissed for failure to state a valid cause of action. With all due respect to the court below, we are of the opinion that it has errone

ously construed the statute in so restricting the class of persons who may recover on the contractor's bond.

It is true that this provision relied on by the lower court appears to be in conflict with the remainder of the statute. But that alone is no reason why this single provision should be controlling to the exclusion of (and at the expense of) the other terms of the Act. We think the following statement made by the Supreme Court in reference to the Heard Act is germane at this point:

> "In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfill its whole purpose." (*Fleischmann Construction Co.* v. *United States to the use of Forsberg*, 270 U. S. 349, 360 (1926).)

It is our considered opinion that the intention of Congress and the broad purpose of the Miller Act can be carried out only by placing the plaintiff within the cloistered class of those persons who may avail themselves of the benefits of the Act. Our position here is buttressed by the legislative hearings prior to the passage of the Act, as well as by the decisions of the Supreme Court. See Vol. 79 Congressional Record, part 12, page 13,382, Senate proceedings, 74th Congress, 1st Session (H.R. 8519).

The Miller Act, being a substitute for the Heard Act, was intended to be remedial and it must therefore be liberally construed. *Fleisher Engineering Co.* v. *United States*, 311 U. S. 15 (1940). Furthermore, the Supreme Court has already viewed the Miller Act as enlarging the protection given to materialmen and laborers under the earlier Heard Act. See *United States to the use of Noland Co.* v. *Irwin*, 316 U. S. 23 (1942).

In *United States to the use of Hill* v. *American Surety Co.*, 200 U. S. 197 (1906), it was held that pursuant to the Heard Act persons, *without qualification or restriction*,

who furnish labor or material in the construction of a public project, could recover on the contractor's bond where the proper statutory notice was given. The reason assigned for this rule was that "The purpose of the Act was to provide security for the payment of all persons who provide labor or material for public work * * *" and that "the basis of recovery is supplying labor and material for the work." See *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380 (1917). Moreover, the Court then went on to make the sweeping statement that "In every case which has come before this Court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act." *Id.* at 380. See, also, *Standard Accident Insurance Company* v. *United States to the use of Powell*, 302 U. S. 442 (1938); *Fleischmann Construction Company* v. *United States to the use of Forsberg*, 270 U. S. 349 (1926).

It is worthy of note, too, that the Supreme Court denied certiorari in a case decided under the Heard Act which is practically on all fours with the instant case. *Utah Construction Company* v. *United States*, 15 F. (2d) 21, (C.C.A. 9th, 1926), *cert. denied*, 273 U. S. 745 (1926). The Court held in this case that a claimant who, like the plaintiff before us, furnished materials toward the construction of a public project through a person having a contract with a contractor to furnish the materials, might recover on the contractor's bond, regardless of whether the person to whom the materials were furnished by the claimant be considered a materialman or a subcontractor.

It is true that the Heard Act did not contain the particular provision which appears in section two of the Miller Act; but we do not deem this to be an operative fact which would mitigate against our construction of the Miller Act.

We prefer to rest our opinion upon the broader con-

siderations heretofore discussed. A few words, however, under a pure analytic technique, would seem in order concerning the so-called proviso:

> "*Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice * * *."

This provision is not a *proviso* as that term is technically defined—a clause or part of a clause in a statute, the office of which is either to except something from the enacting clause, or to qualify or restrain its generality. Quite obviously, this provision is not an *exception*, which exempts absolutely from the operation of a statute. The provision is essentially an *explanation*—to make clear (what was not clear under the prior Heard Act) that the absence of direct contractual relationship with the general contractor should not defeat actions on the payment bond. Thus, the underlying idea of the provision was to extend (rather than to restrict) the ambit of the Miller Act. The provision came not to destroy but to fulfill; to give more abundant life to the broad sweep of an admittedly beneficient remedial statute.

Accordingly, every effort should be made by us to give to the word "subcontractor", in this setting, a broad, general (rather than its narrow, technical) denotation. Under such an interpretational philosophy, there is little need and less reason for limiting the term to the Tweedledums who perform services and exclude the Tweedledees who supply materials.

The Court below relied heavily on a number of decisions construing state public work statutes. These authorities, of course, are not binding on us in the interpretation of federal legislation, and at best they are deceptive since the purpose, scope and terms of the state enact-

ments are so varied and so different from the act under consideration. Nor do we feel it necessary to indulge in lingual gymnastics by losing ourselves in the labyrinth of divergent decisions which attempt to make a distinction (either practical or theoretical) between a "subcontractor" and a "materialman". We cordially agree with the court below in that an effort to do so would only leave "the searcher after truth in a state of unhappy confusion." *Cf. McNab & Harlin Mfg. Co.* v. *Paterson Building Co.*, 72 N. J. Eq. 929, 67 Atl. 103 (1907), with *Northwest Roads Co., et al.* v. *Clyde Equipment Co.*, 79 F. (2d) 771, (C. C. A. 9th, 1935). Suffice it to say that the Supreme Court itself has used "subcontractor" and "materialman" interchangeably. *Eg., United States Fidelity & Guaranty Co.* v. *United States to the use of Golden Pressed & Fire Brick Co.*, 191 U. S. 416 (1903). Inasmuch as there is no uniform rule on the subject, we are satisfied that Congress used the word "subcontractor" in its broad, generic sense so as to include persons who have a contract to furnish building materials to a materialman. By so doing, instead of torturing the meaning of the disputed provision in section two of the Miller Act, we attempt to bring it into harmony with both the Congressional intent and the express wording of the remainder of the statute. *Cf. United States to the use of Alexander Bryant Co.* v. *New York Steam Fitting Co.*, 235 U. S. 327 (1914); *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429 (C. C. A. 3d, 1914).

Accordingly, for the reasons assigned, the judgment of the lower court is reversed.

Reversed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

Order Reversing Judgment.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MACEVOY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

Before JONES, DOBIE and GOODRICH, *Circuit Judges.*

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

By the Court,

August 13, 1943.

JONES,
Circuit Judge.

Endorsements—

Order Reversing Judgment, etc.
Received & Filed Aug. 13, 1943
WM. P. ROWLAND, Clerk

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

Docket No. 8351.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Appellees.

Petition for Rehearing.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company, the appellees herein, respectfully petition this Court for a rehearing of the appeal heard by this Court on July 8, 1943, and decided on August 13, 1943, on the grounds hereinafter set forth.

STATEMENT OF THE FACTS AND THE ISSUE.

This is an action by the "use plaintiff", Calvin Tomkins Company, hereinafter called the plaintiff, upon a payment bond furnished by defendant Clifford F. MacEvoy Company, as principal, and defendant The Aetna Casualty and Surety Company, as surety, under the Miller Act,

49 Stat. at L. 793, 794, 40 U. S. C. A. 270a, 270b, in connection with a construction contract between defendant MacEvoy Company and the United States of America.

The substance of plaintiff's complaint is that the defendant MacEvoy Company purchased from James H. Miller & Company certain building materials for such project, that such materials were obtained by Miller & Company from the plaintiff and that Miller & Company has failed to pay the plaintiff for some of said materials.

The defendants, before answer, moved for an order dismissing the action on the ground that plaintiff failed to state a claim against defendants on which relief could be granted. An order and decree dismissing the complaint, with costs, was made and entered by the District Court on April 5, 1943, and plaintiff appealed therefrom to this Court; said appeal being argued on July 8, 1943 and decided on August 13th, 1943.

The sole issues involved were whether the Miller Act subjects a Government contractor and his surety to liability, under the payment bond, to a third person who has furnished material to a materialman dealing with the contractor in the absence of any contractual relationship between said third person and any subcontractor, and whether the word "subcontractor", as used in Section 2(a) of the Miller Act, includes a mere materialman.

Decision.

This Court, in its opinion filed August 13th, 1943, held that plaintiff was entitled to sue upon the payment bond and reversed the judgment of the lower court.

Grounds for Rehearing.

I. *This Court Has Failed to Give Proper Effect to the Proceedings in Congress, and to the Committee Hearings and Reports in Connection With the Adoption of the Miller Act in Order to Ascertain the True Intent of Congress.*

Petitioners feel that, due to the number of arguments presented to this Court by both sides, the Court has not fully appreciated or considered the history and circumstances surrounding the enactment of this legislation, and that a more detailed analysis and review of the same might result in a decision affirming the District Court.

The Court, in its opinion, at page 5, makes only one reference to the legislative history as follows:

> "Our position here is buttressed by the legislative hearings prior to the passage of the Act, as well as by the decisions of the Supreme Court. See Vol. 79 Congressional Record, part 12, page 13, 382. Senate Proceedings, 74th Congress, 1st Session (H. R. 8519)."

This reference is undoubtedly the same reference made in the appellant's brief quoting Senator Burke at the time of introducing the Senate Committee Report. An examination of the legislative history, however, shows that the Senate held no hearings (see Senator Burke's own statement to this effect on the same page of the Congressional Record), all of the work having been done by the House Committee, the Senate adopted the House report, and both the Senate and the House reports completely negatived the generality of Senator Burke's statement which was not made in response to any question affecting the issue here involved. In any event, as we shall hereafter show, the report which Senator Burke presented is controlling on him as well as upon the courts

and that report is entirely inconsistent with the decision which has been reached by this Court.

The Miller Act, in the form in which it was finally enacted, was first presented to the House of Representatives by Rep. Miller as H. R. 8519 (Congressional Record, 74th Congress, 1st Sess., Vol. 79, part 9, p. 9410), and referred, without discussion, to the Committee on the Judiciary. At least eight other bills dealing with the same subject matter were introduced and referred to that committee. Hearings were held on all these bills by the Subcommittee of the Committee on the Judiciary, of which Mr. Miller acted as Chairman (see Hearings before the Committee on the Judiciary, House of Rep., 74th Congress, 1st Sess., U. S. Gov't. Printing Off. Doc. #143338). These various bills differed substantially on the question of protection to persons not dealing directly with the contractor, and some of them contained clauses which would clearly extend the protection of the payment bond to the most remote furnishers of labor or materials. None of these bills was reported out of Committee, except H. R. 8519 which was enacted by both the House and Senate, without amendment.

No debate was had in either the House or the Senate, the bill being passed upon the report of the Committees (House Report No. 1263; Senate Report No. 1238). The final proceedings in the Senate show that the Senate Judiciary Committee held no hearings on this bill, but acted upon and adopted in full the House Committee report which was based upon the most extensive hearings. (Cf. House Proceedings, Cong. Rec., Vol. 79, Part 11, p. 11702; Senate Proceedings, Cong. Rec., Vol. 79, Part 12, p. 13382.)

With this background, therefore, it is obvious that the true intent of the legislative body, and the meaning of the proviso contained in Section 2(a) of the Act, can be determined only after the most careful analysis of the House Committee hearings and report. We believe

that such analysis conclusively demonstrates that Congress intended to restrict protection of the bond to exclude persons having no contractual relationship with either the principal contractor or a subcontractor, and this is the only construction which can give effect to the statute, or meaning to the Committee Report or the proceedings upon which it was based.

It is well established by decisions of the Supreme Court that the meaning of doubtful or ambiguous statutes may be shown by reference to Committee reports or statements of the member having the bill in charge, and that contrary statements made in debate in Congress are of very little weight to contradict expressions of intent found in the Committee reports. In *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 86 L. Ed. 726 (1942), Chief Justice Stone said at page 124 *et seq.*:

> "In adopting the change in the new bill, giving to the Secretary the authority to regulate the handling of products 'directly affecting' interstate commerce, and in deleting the phrase 'in competition with' interstate commerce, the House and Senate Committees on Agriculture, after referring to the *A. L. A. Schechter Poultry Corp.* case, stated: 'This phrase has been omitted from the proposed §8c(1) of the bill which deals with orders * * * because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.' See S. Rep. No. 1011, p. 9; H. Rep. No. 1241, p. 8, 74th Cong. 1st Sess.
>
> "The same interpretation of the amendments was given by the Committee representative charged with explaining them on the floor of the Senate, who declared, 79 Cong. Rec. 11,139, 'The position of the

Committee in respect to these amendments is that intrastate commerce may burden or affect interstate commerce and that consequently this is a constitutional enactment under the decision of the Court in the *Shreveport* Case.' The House debates also disclose general recognition that the bill as amended was intended to be a full exercise of the federal power over competing intrastate milk. 79 Cong. Rec. 9479-9480, 9485.

"The opinions of some members of the Senate, conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the Committees on the floor of the Senate and the House, are not to be taken as persuasive of the Congressional purpose. Cf. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 318, 41 L. Ed. 1007, 1019, 17 S. Ct. 540. Moreover, other Senators, not members of the Committee on Agriculture, accepted its view of the extent to which the federal power was to be exerted by the proposed legislation."

See also:

Lapina v. *Williams*, 232 U. S. 78, 89;
Duplex Printing Press Co. v. *Deering, et al.*, 254 U. S. 443, 475;
McLean v. *United States*, 226 U. S. 374, 380;
Northern Pacific Railway Co. v. *State of Washington*, 222 U. S. 370, 380;
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U. S. 320, 333.

(N. B. For a recent example of the comprehensive reference to Committee reports and reliance thereon by the United States Supreme Court, see *Boone* v. *Lightner*, 87 L. Ed. 1099, decided June 7, 1943.)

As has been stated above, the Act is identical with H. R. 8519 which was introduced by Representative Miller. However, prior to the introduction of H. R. 8519, Representative Miller had introduced H. R. 6677. That earlier bill, which is set forth in full in the Committee hearings, was substantially (with certain minor variations) the same as his later bill 8519, with the notable exception that Section 2(a), which is here in issue, was so worded in the earlier bill as to require only the requisite notice from persons having no contractual relationship with the contractor to permit them to sue upon the bond. Under that bill it is clear that the plaintiff herein would be entitled to the protection of the bond. However, in the later bill introduced by Representative Miller, and which was finally enacted, Section 2(a) was radically changed by making direct contractual relationship with a subcontractor a prerequisite for suit in any case where no contractual relationship existed between the claimant and the contractor.

The earlier bill, H. R. 6677, was never reported out of Committee. H. R. 8519, which was substituted for it, was favorably reported after considerable discussion, both pro and con, in the public hearings as to the advisability or inadvisability of affording protection to remote claimants. A copy of Section 2(a) of H. R. 6677 and a copy of Section 2(a) of H. R. 8519 (now the Miller Act) are annexed hereto as exhibits.

It is thus apparent that Congress, after the most complete consideration by its Judiciary Committee, has rejected legislation which would extend protection of the bond to claimants as remote as this appellant and has enacted legislation containing specific limitations.

As has been previously pointed out to this Court, the House Committee's Report (Report No. 1263) and the

Senate Committee's Report (Report No. 1238), both of which are identical, contain the following language:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor but that is as far as the bill goes. *It is not felt that more remote relationships ought to come within the purview of the bond.*" (Italics ours.)

We have, therefore, a situation where Congress rejected a bill which would have given plaintiff the protection it claims and passed a bill which contains, to say the least, definite language of limitation. The proviso in Section 2(a) is the only language of limitation to which the above quoted paragraph from the Committee Reports could have reference. Even granting that the statement in the Committee Reports is not couched in the most accurate, technical, legal language, it definitely indicates that the Committee meant the proviso in Section 2(a) to be a limitation, and that the House and the Senate, in passing the bill without debate and upon the basis of their Committees' Reports, must have intended to carry such limitation into effect. As was said by Judge Cardozo in *103 Park Avenue Co. v. Exchange Buffet Corp.*, 242 N. Y. 366, 374, the duty of the Court "is to search out the intention of the Legislature and to give effect to it when discovered though the expression be imperfect".

II: *The Importance of and Public Interest in the Issues Determined, Warrants Reconsideration by this Court.*

While not wishing in this petition to renew matters which may be presumed to have received the full consideration of this Court, we do wish to point out the following considerations affording additional reason for rehearing, namely:

(a) The unusual importance of the question involved,

not only to public contractors, surety companies and the building trades, but to the Government itself, in so far as the decision will undoubtedly result in a substantial increase in bond premiums and corresponding increased cost to the Government in carrying out public works.

(b) The fact that, although this is remedial legislation which is ordinarily liberally construed, the issue involves the determination of the persons protected by such legislation and, therefore, the rule of strict construction must be applied. To a large extent this distinction is the answer to the liberal pronouncements made by the Supreme Court in dealing both with this statute, and its predecessor, the Heard Act, since in the cases in question the Court was considering procedural problems or the rights of persons who clearly came within the protection of the statute.

(c) The relationships, rights and obligations of respective persons, such as contractors, subcontractors, materialmen and vendors, are the subject of the most technical and exacting treatment in the large body of law affecting the building construction trades, and such relationships and rights under any statute of such wide-spread significance as the Miller Act, should be determined only after the most searching consideration.

Wherefore a rehearing is respectfully prayed.

Dated: August 25, 1943.

Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company,
Appellees.

By Elmer O. Goodwin,
Attorney.

Edward F. Clark,
Of Counsel.

Certificate of Counsel.

I HEREBY CERTIFY that I am of counsel for the appellees, petitioners in the above matter; that the foregoing petition for a rehearing is filed in good faith upon a real and substantial ground and not for mere purposes of delay.

EDWARD F. CLARK,
Of Counsel for Appellees.

Exhibit I.

(EXTRACT FROM H. R. 6677)

2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor or material for which such claim is made was done, performed, furnished, or supplied by him, shall have the right to sue on such payment bond for such amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for such sum or sums as may be justly due him: Provided, however, That any such person who has no contractual relationship, express or implied, with the contractor furnishing said payment bond shall not have a right of action upon the said payment bond unless such person shall have given written notice to said contractor within ninety days after such labor or material has been supplied by such person, stating with substantial accuracy the amount claimed and the name of the party with whom said person contracted. Such notice shall be served in any manner in which the United States marshal of the district in which the contractor does business or resides is authorized by law to serve a summons, save that such service need not be made by the marshal or by mailing said notice by registered mail, postage prepaid, in an envelope addressed to the contractor at his last-known place of business or residence.

Exhibit II.

(EXTRACT FROM H. R. 8519—NOW THE MILLER ACT)

2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

Order Denying Petition for Rehearing.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 8351—October Term, 1942.

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Appellant,

vs.

CLIFFORD F. MACEVOY and AETNA CASUALTY AND SURETY COMPANY,

Appellees.

SUR PETITION FOR REHEARING.

AND NOW, to wit, September 20, 1943, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia,

JOHN BIGGS, JR.,
Circuit Judge.

Endorsements—

Order Denying Petition for Rehearing
Received & Filed Sept. 20, 1943
WM. P. ROWLAND, Clerk

Clerk's Certificate.

United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit—*Set.*

I, WM. P. ROWLAND, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY that the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Appellant and Appellees, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of United States of America, for use and benefit of Calvin Tomkins Co., Appellant, v. Clifford F. MacEvoy and Aetna Casualty and Surety Company, Appellees, No. 8351, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of October in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the one hundred and sixty-eighth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of
Appeals, Third Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 13, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket. The Solicitor General is invited to file a brief as amicus curiae if he is *do* advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 483

CLIFFORD F. MacEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

—against—

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELMER O. GOODWIN,
Counsel for Petitioners,
507 Orange Street,
Newark, New Jersey.

EDWARD F. CLARK,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

Table of Cases Cited:

TABLE OF AUTHORITIES CITED:

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Respondent.

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court is invoked under Section 240(a) and subsection 8(a) of the Judicial Code, as amended, 28 U. S. C., Sections 347 and 350, and Supreme Court Rule XXXVIII, par. 5(b).

SUMMARY STATEMENT.

Petitioners, Clifford F. MacEvoy Company (hereinafter called MacEvoy Co.) and The Aetna Casualty and Surety Company, by their counsel, pray that a writ of certiorari issue to review a decision (R. 22) of the United States Circuit Court of Appeals for the Third Circuit, rendered August 13th, 1943, in an action entitled *United States of*

America for the Use and Benefit of the Calvin Tomkins Company, Plaintiff, against *Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company*, Defendants, Docket #8351, reversing an order and decree (R. 15) of the District Court of the United States for the District of New Jersey in favor of petitioners, which dismissed the complaint of plaintiff, the Calvin Tomkins Company (hereinafter called Calvin Tomkins), on motion of the petitioners, on the ground that the same failed to state a claim against defendants on which relief could be granted.

This is an action by the "use-plaintiff", Calvin Tomkins Co., upon a payment bond (R. 16) furnished by MacEvoy Co., as principal, and Aetna Casualty and Surety Company as surety, under the Miller Act, 49 Stat. at L. 793, 794; 40 U. S. Code, Sec. 270 a-d (printed as Appendix A to Petitioners' Brief, pp. 27-30), in connection with a contract, dated June 3, 1941, between the United States of America, acting through the Federal Works Administration, and MacEvoy Co. for the construction of a defense housing project near Linden, New Jersey. Such contract, as is indicated by the complaint (R. 4), was on a "cost plus fixed fee" basis.

The substance of the complaint (R. 3-6) is that MacEvoy Co. purchased from one James H. Miller & Company certain building materials for such project, that such materials were obtained by Miller & Company from plaintiff and that Miller & Company has failed to pay plaintiff a balance of $12,033.49. There is no allegation that Miller & Company agreed to perform or did perform any part of the work on said construction project. Neither is it disputed that MacEvoy Co. paid its materialman, Miller & Company, in full (R. 18-19).

Defendants' motion to dismiss the complaint (R. 7) for failure to state a claim on which relief could be granted,

was granted by District Court Judge Fake with an opinion (R. 8-14). An order and decree of the District Court dismissing the complaint was entered April 5, 1943, which order and decree was reversed by the Circuit Court of Appeals with an opinion (R. 21-29), and order of reversal filed August 13th, 1943 (R. 30). Defendants' petition for rehearing (R. 31-42) was denied on September 20th, 1943 (R. 43).

Questions Presented.

(1) Whether a third person (the "use plaintiff"), supplying material to a materialman (Miller & Co.) who in turn furnishes the same to the principal contractor (MacEvoy Co.) may recover against the principal contractor and its surety under the payment bond furnished pursuant to the Miller Act where

   (a) No contractual relationship, express or implied, exists between said third person and the principal contractor, and

   (b) No contractual relationship exists between said third person and any subcontractor performing any part of the work under the public contract.

(2) Whether the decision of the Circuit Court of Appeals is not directly contrary to the plain legislative intent as shown both by the language of the Miller Act and the legislative history leading up to its enactment.

(3) Whether the construction placed upon Section 2(a) of the Miller Act (40 U. S. C. Sec. 270b(a)) by the Circuit Court of Appeals does not result in subjecting Government contractors to an indeterminable and unlimited possible liability under the

payment bond as against a definite standard of liability limited to liability to persons having contractual relationship, express or implied, with the principal contractor, or direct contractual relationship with a subcontractor.

(4) Whether the word "subcontractor" as used in the first sentence of said Section 2(a) of the Miller Act includes a mere materialman performing no work or labor.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Reason 1: The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(a) The question here involved, which may be broadly stated as involving the determination of the classes of persons entitled to sue upon the payment bond under the Miller Act, has not only never previously been passed upon by this court, but has never previously been passed upon by any federal court.

(b) The importance of the question and necessity for final determination by this Court is indicated by the following:

(1) The legislative history, including the predecessor statute, the Heard Act, 28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L. 1167; 40 U. S. C. Sec. 270 (printed as Appendix B to Petitioners' Brief at pp. 31-33) and the extensive hearings held before the Committee on the Judiciary at the time of enactment of the Miller Act, at which surety company, materialmen, contractors, and Government representatives testified to the urgent need for definite legislation to correct then existing evils or ambiguities.

(2) The fact that the decision of the Circuit Court of Appeals effects an important change in the previously prevailing law as to the relationship, rights and obligations of respective classes of persons in the building construction trades such as contractors, subcontractors, materialmen and vendors and breaks down well-established and important definitions of and distinctions between these classes, leaving this important field of the law in a chaotic state.

(3) The unusual construction of the word "subcontractors" by the Circuit Court of Appeals, which is at variance with the construction adopted by the majority of the State courts in construing similar state statutes as well as state laws affecting mechanics' liens.

Reason II: The decision of the Circuit Court of Appeals, insofar as it purports to follow the decisions under the earlier Heard Act, is in conflict with a reported opinion of a federal court of similar appellate jurisdiction, *i. e.*, the decision of the Court of Appeals of the District of Columbia in the case of *Continental Casualty Co.* v. *North American Cement Corp.*, 91 F. (2d) 307, upon a statute of said District identical with the Heard Act, but decided after the enactment of the Miller Act.

Reason III: The public interest, and particularly the interest of the United States Government, will be promoted by prompt settlement in this Court of the questions involved.

A logical extension of the holding of the Circuit Court of Appeals would permit all persons, no matter how remote their relationship to the contractor or to any subcontractor, to sue upon the payment bond if their work, labor or materials ultimately contributed to the public

project—including the laborer in the mines, the logger in the logging camp and indeterminable classes of persons, against whose claims no amount of prudence could protect the contractor or his surety.

This totally unjustifiable and indeterminable risk placed upon Government contractors by this decision will undoubtedly result in substantially increased costs to the Government in the performance of public contracts. This is particularly true in the "cost plus fixed fee" type of contract which is the form of petitioners' contract with the Government (R. 4). The very nature of the "cost plus fixed fee" contract restricts the contractor in making his own selection of materialmen and subcontractors to those submitting the lowest bids, frequently resulting in rejection of those most financially responsible. Contractors will necessarily refuse to perform Government work at prevailing fees but will insist that such fees cover the possible liability to the most remote claimants as the only means by which the contractor can obtain a semblance of protection. It is equally true that in "lump sum" contracts such extraordinary risks and possible liability will be reflected in the bids submitted to the Government. The increased cost of the bond premium which will be required by surety companies under such holding will, of course, ultimately be borne by the Government and reflected in any "lump sum" bid or in the cost of any "cost plus" contract. The Government interest is also substantially involved from the viewpoint of its possible liability to reimburse "cost plus fixed fee" contractors for loss incurred from such claims made by persons having no contractual relationship with the contractor or any subcontractor, on the equitable ground that the fixed fee did not contemplate such loss to be borne by the contractor who has complied with the statutory requirements, and, therefore, must be borne by the

Government as a part of the cost of the public project. The present era of large scale Government construction, as well as the probable participation by the Government in post-war reconstruction, requires settlement of this question at the present time.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of ... ls of the Third Circuit, commanding said court to ce. ify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 8351, *United States of America for the Use and Benefit of the Calvin Tomkins Company*, Appellant, against *Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company*, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, Newark, New Jersey, November 5, 1943.

ELMER O. GOODWIN,
Counsel for Petitioners.

EDWARD F. CLARK,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court is officially reported at 49 F. Supp. 81, and is printed in this Record (R. 8-14). The opinion of the Circuit Court of Appeals, filed August 13th, 1943, is not yet officially reported but is printed in this Record (R. 22-29).

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at page 1 of the foregoing petition, and is, by reference, adopted as part of this brief.

Statutes Involved.

The statute directly involved is the Miller Act, 49 Stat. at L. 793, 794, Act of August 24, 1935, Chapter 642, Secs. 1, 2, 3, 4 (40 U. S. C. Sec. 270a-d) and is printed as Appendix A hereto (pp. 27 to 30 hereof).

The specific portion of the Miller Act, more particularly involved is the construction of the following language contained in Section 2(a) (40 U. S. C. Sec. 270b(a)):

> "Sec. 2(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made * * *"

The Heard Act (Act of August 13, 1894, Ch. 280, as amended, 28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L. 1167; 40 U. S. C. Sec. 270) which preceded the Miller

Act and was repealed at the time of enactment of the Miller Act, is indirectly involved as possibly bearing on the construction of the Miller Act. The Heard Act is printed as Appendix B hereto (pp. 31 to 33 inclusive).

Statement.

The material facts have been set forth in the Summary Statement at pages 1 to 3 of the preceding Petition and such statement is, by reference, adopted as part of this brief.

Argument.

POINT I.

The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

A. This Court has not previously passed upon the question here involved.

The precise question here involved, namely, whether the vendor of a materialman, furnishing materials to a materialman who performed no work or labor, in connection with a Government project, is entitled to sue upon the payment bond of the public contractor under the Miller Act, has not only never been passed upon by this Court but has never been previously determined by any Federal Court.

> "Apparently, the question is one of first impression since our independent research and that of both counsel have failed to unearth any similar situations passed upon by either the Supreme Court or any Circuit Court of Appeals." Cf. Opinion, Circuit Court of Appeals (R. 23).

The much broader question involved in the holding of the Circuit Court of Appeals, namely, the unlimited right of the most remote claimants to sue upon the bond, is similarly without precedent in any of the Federal Courts insofar as the Miller Act is concerned.

The case of *Fleisher Engineering & Construction Co. v. United States*, 311 U. S. 15, while it involved the section of the Miller Act here in question, dealt only with the procedure in giving the required notice to the contractor. This Court, however, in that case expressly pointed out, at page 18 of its opinion, that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provisions as to the manner of serving notice; apparently implying a strict construction of so much of the proviso as described the persons entitled to sue and the relationships covered.

Moreover, this Court has not passed upon the questions here involved in any case decided under the predecessor statute, the Heard Act. Any such determination under the Heard Act in any case would not be controlling in view of the fact that the Heard Act did not contain the express language of limitation set forth in Section 2(a) of the Miller Act.

Plaintiff, and the Court below, place great stress upon the case of *Utah Construction Co. v. United States To Use of Lindstrom Const. Co.*, 15 F. 2d 21, decided under the Heard Act, and the denial of certiorari in that case by the Supreme Court (see Op. of C. C. A.—R. 27). That case does not constitute an adjudication by this Court of the question here involved, for the following reasons: First, it involved a different statute which contained no such clarifying provision as Section 2(a) of the Miller Act, which obviously was an effort on the part of the legislature to eliminate the ambiguity which existed in the

Heard Act, and which led to the necessity of the Supreme Court insisting upon a liberal construction of that Act to correct the very restricted construction which had been adopted by some of the lower courts. *Hill* v. *American Surety Co.*, 200 U. S. 197; *Illinois Surety Co.* v. *John Davis Co. et al.*, 244 U. S. 376; secondly, the evidence submitted and the findings of the lower court after trial of the issues in that case were sufficient for the Circuit Court of Appeals to hold that the persons whose claims were allowed were either subcontractors or persons who dealt with subcontractors, the Court saying at page 24 of its opinion:

> "The fact that the contract with Paul provided for compensation computed upon the quantity of material transported does not necessarily affect the question; nor, indeed, would it exclude his relationship as that of a subcontractor. * * * *But as he did supply material and labor* which were used, whether he be called a materialman or a subcontractor supplying labor is not of vital importance, for the statute is broad enough to afford protection to him and relator." (Italics supplied.)

Thirdly, this Court never reviewed the *Utah Construction Company* case, *supra*, but merely denied certiorari, which denial does not in any way import an expression of opinion upon the merits of the case.

United States v. *Carver*, 260 U. S. 482, 490.

B. The legislative history of the Miller Act indicates the importance of the question involved and necessity for final determination by this Court.

The Miller Act was enacted in 1935, to replace the Heard Act, which required a single bond to be given by

the contractor, the United States having the right, within a certain time, to bring suit and have claims of various claimants adjudicated. If no such suits were brought, the claimants could institute suit only after six months following completion and final settlement. Under the Miller Act the contractor is required to furnish two bonds, namely, a performance bond for the protection of the United States and a payment bond for the protection of persons furnishing labor and materials. It has been indicated that the Miller Act was intended solely to correct procedural defects in the Heard Act and gave no new substantive rights to laborers and materialmen.

> *United States to Use of Kewaunee Mfg. Co.* v. *United States Guarantee Co.*, 37 F. Supp. 561 (Dist. Ct., W. D. N. Y., 1939);
>
> *Irwin et al.* v. *United States to Use of Noland Co. Inc.*, 122 F. (2) 73, at 76 (U. S. Ct. of App. Dist. of Col., 1941), reversed on other grounds 316 U. S. 23.

The Heard Act was repealed at the time of the enactment of the Miller Act. The Miller Act originated in the House of Representatives as HR-8519, and was referred to the House Judiciary Committee. The report of the Committee (Report No. 1263) was adopted and acted upon by the House without opposition. Reference to the Congressional Record indicates that no opposition to the bill arose in the Committee, and that the report of the Committee was unanimous (Cong. Rec. Vol. 79, Part 11, p. 11702).

In the Senate the bill was referred to the Senate Judiciary Committee and was favorably reported by that Committee (Report No. 1238). The Senate also acted on the report of its Committee without any opposition.

The Senate Judiciary Committee adopted, in full, as its report, that of the House Judiciary Committee (Cong. Rec. Vol. 79, Part 12, p. 13382). Accordingly, both reports contain the following language which seems conclusive on the issue presented in this case:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond."

The Congress, through its Committees, obviously was expressing a limitation upon the classes of persons protected, and even though such expression might be imperfectly phrased it is important that the courts ascertain and give effect to such legislative intent.

> *103 Park Ave. Co.* v. *Exchange Buffet Corp.*, 242 N. Y. 366, 374 (Cardozo, *J.*).

The proviso contained in Section 2(a) of the Act is, of course, the only language of limitation in the bill to which the Committee Report could have reference. This Report was adopted after extensive hearings held by the House Committee (Hearing before Committee on the Judiciary, House of Rep. 74th Congress, 1st Sess., U. S. Govt. Printing Office, Doc. #143338) on a number of similar bills at which testimony was given by representatives of contractors, materialmen, surety companies and the Government. The importance which the Committee attached to the proviso is indicated by the fact that an almost identical bill had been introduced by Representative Miller, Chairman of the Sub-Committee (HR-6677). This bill was withdrawn and the final bill which bears the name of its author (HR-8519) was adopted. Section 2(a) of each of these bills is reproduced as Exhibits I and II.

to Petitioners' Petition for Rehearing (R. 41, 42). The language of the proviso in the former bill, which was not enacted (R. 42), would have entitled the plaintiff to sue upon the payment bond. This bill, however, was rejected and HR-8519, which contains clear language of limitation and which is referred to as a limitation in the Committee Report, was enacted.

The decision of the Circuit Court of Appeals completely disregards or lightly disposes of all these considerations, namely: the fact that the Miller Act, which replaced the Heard Act, contained express provisions for the determination of the classes of persons entitled to sue; the Committee Report, after extensive hearings on the bill, plainly indicated that it intended such limitation; and it rejected a similar bill which would have permitted suit upon the bond by persons such as the plaintiff.

It is well established by decisions of this Court that the meaning of doubtful or ambiguous statutes may be shown by reference to Committee reports or statements of the member having the bill in charge, and that contrary statements made in debate in Congress are of very little weight to contradict expressions of intent found in the Committee reports.

United States v. *Wrightwood Dairy Co.*, 315 U. S. 110, 124;

Lapina v. *Williams*, 232 U. S. 78, 79;

Duplex Printing Press Co. v. *Deering, et al.*, 254 U. S. 443, 475;

McLean v. *United States*, 226 U. S. 374, 380;

Northern Pacific Railway Co. v. *State of Washington*, 222 U. S. 370, 380;

Oceanic Steam Navigation Co. v. *Stranahan*, 214 U. S. 320, 333.

It is submitted that the legislative history, and particularly the Committee Reports, required the Circuit Court of Appeals to affirm the District Court, and that its failure to do so requires review by this Court.

C. The Circuit Court of Appeals decision creates confusion in the important field of building contract law as applied both in the Federal and State courts.

The Circuit Court of Appeals in its opinion (R. 22-29) has failed to give effect to the well recognized distinction in the building construction trade and in building contract law between a subcontractor and a materialman. This distinction is at the root of the mechanics' lien law statutes which may be said to be in *pari materia* with payment bonds under Government contracts, payment bonds being intended to protect persons who would otherwise be entitled to a mechanic's lien if the property in question were privately owned.

> *Irwin et al.* v. *U. S. to Use of Noland Co., Inc.*, 122 F. 2d 73 (reversed on other grounds 316 U. S. 23);
>
> *Neary, et al.* v. *Puget Sound Engineering Co. et al.*, 114 Wash. 1, 194 Pac. 830;
>
> *City of St. Louis* v. *Kaplan-McGowan Co.*, 233 Mo. App. 789, 108 S. W. 2d 987.

Despite the reference in the Circuit Court's opinion (R. 28-29) to the lack of accord between the cases distinguishing between a subcontractor and a materialman, it is certainly established by the overwhelming weight of authority in this country that

> "a subcontractor is one who furnishes work and materials, or work alone, under a contract, not with the owner, but with the contractor."

Boisot on Mechanics' Liens, Section 223, and that as a general rule one who merely furnishes the contractor with materials performing no work or labor is a materialman.

Boisot on Mechanics' Liens, Section 224;
Bloom on Mechanics' Liens, Sections 77, 78 and 79;
Staples v. *Adams, Payne & Gleaves, Inc.*, 215 Fed. 322;
Neary et al. v. *Puget Sound Engineering Co., et al.*, 114 Wash. 1, 194 Pac. 830;
9 Corpus Juris 694;
40 Corpus Juris 130.

Not only is the Circuit Court of Appeals decision at variance with the weight of authority in this country with respect to the general classification and definition of subcontractors and materialmen, but is in conflict with the weight of authority under similar public works statutes enacted by the various states.

"• • • it is generally held that a remote materialman, *i. e.*, one furnishing materials to a mere materialman rather than to a contractor or subcontractor, cannot recover on a public contractor's bond executed pursuant to a statute providing for a bond for the benefit of laborers and materialmen, although such materialman in turn sells the material to a contractor or subcontractor."

118 A. L. R. Anno. at p. 84;
Northwest Roads Co. v. *Clyde Equipment Co.*, 79 F. 2d 771 (C. C. A. 9th, 1935);
Neary v. *Puget Sound Engineering Co.*, 114 Wash. 1, 194 Pac. 830;
Garbutt v. *Chappe et al.*, 131 Cal. App. 284, 21 Pac. 2d 594;

Huddleston v. *Nislar*, 72 S. W. 2d 959 (Ct. of Apps. Texas, 1934);
City of St. Louis v. *Kaplan-McGowan Co.*, 233 Mo. App. 789, 108 S. W. 2d 987;
Marsh v. *Rothey*, 177 W. Va. 94, 183 S. E. 914.

Moreover the Circuit Court holding will have the effect of creating uncertainty in a great number of public contracts entered into by various departments of the United States Government including the War and Navy Departments. As is well known, in these contracts and in the execution of them by the various Government Departments, a distinction has always been made between subcontractors and materialmen, subcontractors being confined to those performing by agreement a portion of the work which the contractor contracted to perform and materialmen being those supplying goods or materials under purchase orders.

Under the "cost-plus-fixed-fee" type of contract a very clear distinction has been made. This distinction is particularly important in view of the decisions of the Comptroller General to the effect that the fixed fee under such contracts is intended to include all work to be performed under the prime contract and that the subletting of any portion of the work other than as expressly provided in the prime contract would result in the Government being improperly charged an additional fee to cover the subcontractor's profit. 20 Comp. Gen. 533 at 536, 537 (Decision B-15341); 21 Comp. Gen. 813 at 816, 817 (Decision B-23215). Obviously the holding of the Circuit Court of Appeals which brushes aside such well-recognized distinctions between subcontractors and materialmen will result in great confusion in the administration of the unprecedented number of Government contracts now in force.

It is submitted that, in view of the fact that the Circuit Court of Appeals decision is not in accord with the well-recognized distinction in the state courts governing relations between contractors, subcontractors and materialmen, which distinction has been followed in the administration of billions of dollars in Government contracts by the United States, and is not in accord with the majority state court decisions on public works statutes upon which the Miller Act was patterned, thus leading to confusion in this important branch of the law, the question here involved should be presently and finally determined by this Court.

POINT II.

The decision of the Circuit Court of Appeals, insofar as it purports to follow the decisions under the earlier Heard Act, is in conflict with a reported opinion of a Federal court of similar appellate jurisdiction.

The Heard Act, which preceded and was repealed by the Miller Act, contained no such specific proviso as is contained in the second section of the Miller Act. The Circuit Court of Appeals, holding that the portion of the Act in question was not a proviso, has purported to follow decisions of this Court under the Heard Act (R. 27-28).

Hill v. *American Surety Co.*, 200 U. S. 197;
Illinois Surety Co. v. *John Davis Co.*, 240 U. S. 376;
Standard Accident Ins. Co. v. *United States For Use of Powell*, 302 U. S. 442;
Fleischman Const. Co. v. *United States for the Use of Fornsberg*, 270 U. S. 349.

None of these cases, which purport to require a liberal construction of the Heard Act, extended the protection of the bond in the Heard Act to persons other than those having contractual relationship with the contractor or with a subcontractor and did not involve the question here presented. The policy of liberal construction adopted by the United States Supreme Court falls within the accepted theory of liberal construction of remedial statutes, which doctrine is limited, however, by the well established rule that remedial statutes are to be liberally construed only with respect to the rights of persons or classes who are established as being within the protection of the statute, and that, in determining the classes protected, the statute must be strictly construed.

> *Tipton Realty & Abstract Co.* v. *Kokomo Stone Co. et al.*, 61 Ind. App. 681, 110 N. E. 688;
> See also *Fleisher Engineering & Construction Co.* v. *United States*, 311 U. S. 15, discussed at page 12, *supra*.

Insofar as the Circuit Court of Appeals has purported to follow the decisions under the earlier Heard Act, it is in conflict with the decision of the Court of Appeals of the District of Columbia in the case of *Continental Casualty Co.* v. *North American Cement Corp.*, 91 F. 2d 307, which case involved a statute of said District identical with the Heard Act. In that case, the Court, speaking of the contention of the plaintiff, who was a vendor of a materialman who supplied cement to the principal contractor, and speaking also of the language contained in *Hill* v. *American Surety Co.*, *supra*, relied upon by that plaintiff, said at page 308:

> "This construction of the statute is about as broad as words can make it. Accepted at face, it implies a

right of protection to any person doing work or furnishing material in the carrying out of the contract however remote the relationship to the contractor. It would permit intervention by the manufacturer of materials furnished to the vendor of a subcontractor even though the subcontractor had paid the vendor in full. It would permit one who sells material to another materialman who in turn furnishes it to the contractor to recover against the bond. It would, in my opinion, establish a rule resulting in confusion; and, since the *Hill* case involves only the right of a furnisher of supplies or labor, immediately to the subcontractor, to look to the bond for protection, the broad implications of the language may be disregarded. For the present, at least, we are unwilling to construe the local statute as going to that extent. In saying this we are not unmindful that at least in one of the other Circuits such a rule was adopted. In the case of *Utah Construction Co.* v. *United States* (C. C. A.), 15 F. (2d) 21, the intervener was a corporation which had supplied materials to the vendor of materials to a subcontractor, and it was held that the statute was broad enough to afford it protection."

The *Continental Casualty Company* case, *supra*, was decided subsequent to the adoption of the Miller Act. While this, strictly speaking, does not constitute a conflict of decisions of different circuits, it does represent a substantial variance between one circuit and a federal court of analogous appellate jurisdiction which, by reason of the large number of public buildings erected within its jurisdiction, has had wide experience with suits relating to Government contracts.

POINT III.

The public interest and particularly the interest of the United States Government, will be promoted by prompt settlement in this Court of the questions involved.

The failure of the Court of Appeals to give any effect to the language of the second section of the Miller Act as a limitation, by way of proviso, opens the door to suits upon the payment bond by an indeterminable class of claimants. Obviously, if no contractual relationship with either the contractor or a subcontractor is required, any person whose work, services or goods have in any way contributed to or been incorporated in the public project may sue upon the bond. This possibility has been recognized by at least one Federal Court and by various state courts in the interpretation of state statutes. *Continental Casualty Co.* v. *North American Cement Corp.* (*supra*), *Garbutt* v. *Chappe, et al.*, 131 Cal. App. 284, 21 Pac. 2d 594. In *Bohnen* v. *Metz*, 126 App. Div. 807 (aff'd 193 N. Y. 676), involving the New York State Labor Law, the Court said at page 809:

> "The construction of the statute contended for by plaintiff would follow the iron beams necessary for a building to the mines, the woodwork to the logging camp and the stone to the quarry, and would put a contractor to the hazard of forfeiture of his contract and all payments due him in the purchase of any material for the construction of any municipal building."

Certainly from the viewpoint of the Government there is no advantage in extending protection beyond the two definite classes, which the statute clearly seems intended

to protect, namely, those who have contributed work or materials through dealings had with the prime contractor or had directly with a subcontractor on whose credit the prime contractor was willing to rely. What public interest would be served by extending such protection to jobbers, manufacturers, dealers, etc., is not to be found either in the statute or the legislative history leading to its enactment.

On the contrary, such a result not only makes the statute impracticable of enforcement, but will have a direct adverse effect upon the letting of public contracts. The writing of the bond by a surety company is no protection to the contractor, as the contractor is primarily liable upon the bond and is required to indemnify the surety company against any loss. The holding of the Circuit Court of Appeals places upon the Government contractors an unlimited and indeterminable risk, against which the contractor is powerless to protect himself. Such risk must, therefore, be reflected in any lump sum bid, or in the fee which the contractor is to receive under a cost plus fixed fee type of contract.

Obviously, Government contractors will not accept Government work at prevailing fees if there is no determinable limit to or means of protecting themselves against possible liability to the most remote claimants who may have contributed work or materials to some part of the completed project, even though such contribution may have been in the manufacture or mining of materials many miles from the site and passing through the hands of numerous persons, such as miners, manufacturers, distributors, supply men, jobbers, vendors and materialmen before final incorporation in the work.

The taking of a bond from subcontractors would be no protection as it would be impossible to determine the scope of the bond unless an endless chain of bonds at pro-

hibitive cost were to be obtained. Moreover, in the prevalent cost plus fixed fee type of contract the Government contractor is required to deal with persons furnishing the lowest bids approved by the Government, and therefore is rarely free to deal with a subcontractor or materialman solely on the basis of the contractor's own knowledge of his reliability and financial responsibility.

Also added to the cost of Government work and ultimately borne by the Government under the holding of the Circuit Court of Appeals will be the greatly increased cost of the premium for writing such bonds exposing the surety company to possible unlimited liability.

Moreover, if the Circuit Court of Appeals decision stands, Government contractors may well claim reimbursement from the Government for sums recovered by unpaid vendors and materialmen who had no direct dealings with the contractor or the subcontractor on the theory that such risk was not contemplated in the determination of the fixed fee, and, therefore, should be borne by the Government as an item of cost of performance.

The Comptroller General has recognized that the prevalent cost-plus-fixed-fee type of contract "contemplates that the actual cost of the whole work and the risk thereof are to be assumed by the Government; that is, that the contractor is to come out whole regardless of contingencies in performing the work in accordance with the contract and the directions and instructions of the contracting officer, plus only a limited fixed fee as compensation for services, general overhead, use of the contractor's own or borrowed money and profit", and that the comparatively small fixed fee is not intended to compensate the contractor for the risks and contingencies of work of such character and magnitude which ordinarily are assumed by the contractor and covered by the contract price. 20 Comp. Gen. 632 at 636, 637 (Decision B-15593). Such

theory is of course entirely contrary to the imposition upon contractors of the unusual risk which results from the holding of the Circuit Court of Appeals.

In view of the unprecedented number of Government contracts now outstanding and the probability that the question here presented will arise in many cases where the Government has insisted upon a payment bond and in view of the expected and probable large scale letting of contracts by the Government in the post-war period, it is essential, in the public interest, that a final determination of this question be made at the present time, thus eliminating the uncertainty and consequent bulk of litigation which prevailed under the Heard Act.

Respectfully submitted,

ELMER O. GOODWIN,
Counsel for Petitioners.

EDWARD F. CLARK,
Of Counsel.

APPENDIX A.

The Miller Act.

An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to Be Accompanied by a Performance Bond Protecting the United States and by an Additional Bond for the Protection of Persons Furnishing Material and Labor for the Construction, Alteration, or Repair of Said Public Building or Public Work.

49 Stat. at L. 793, Act Aug. 24, 1935, c. 642, §1, 40 USCA §270a. **Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half

the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §2, 40 USCA §270b. **Same; rights of persons furnishing labor or material.**

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at

the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

40 Stat. at L. 794, Act. Aug. 24, 1935, c. 642, §3, 40 USCA §270c. **Same; right of person furnishing labor or material to copy of bond.**

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §4, 40 USCA §270d: **Same; definition of "person" in sections 270a, 270b and 270c.**

Sec. 4. The term "person" and the masculine pronoun as used in sections 270a, 270b and 270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

Sec. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C. title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

APPENDIX B.

The Heard Act.

(Repealed by the Miller Act, §5.)

40 USCA §270 (Aug. 13, 1894, c. 280, 28 Stat. at L. 278; Feb. 24, 1905, c. 778, 33 Stat. at L. 811; Mar. 3, 1911, c. 231, §291, 36 Stat. at L. 1167). **Bonds of contractors for public buildings or works; right of persons furnishing labor and material.**

Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said in-

interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any

amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 483.

CLIFFORD F. MacEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

—against—

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,
Respondent.

BRIEF FOR PETITIONERS.

EDWARD F. CLARK,
Counsel for Petitioners.

ELMER O. GOODWIN,
JOHN A. SHORTEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Opinions Below.

The opinion of the District Court (R. 8-14) is officially reported at 49 F. Supp. 81. The opinion of the Circuit Court of Appeals (R. 22-29) is officially reported at 137 F. 2d. 565. The order of this Court granting petitioners a writ of certiorari (R. 45) is not yet officially reported.

Basis for Jurisdiction.

Jurisdiction is invoked under Section 240(a) and Subsection 8(a) of the Judicial Code, as amended, 28 U. S. C. Sections 347 and 350, and the order of this Court, dated December 13, 1943 (R. 45) granting petitioners' petition for a writ of certiorari.

Statement of the Case.

This action, entitled in the District Court *United States of America for the Use and Benefit of the Calvin Tomkins Company*, Plaintiff, against *Clifford F. MacEvoy Company* and the *Aetna Casualty and Surety Company*, Defendants, was instituted in the District Court of the United States for the District of New Jersey.

This is an action by the "use plaintiff" (hereinafter called Calvin Tomkins Co.) upon a payment bond (R. 16), furnished by Clifford F. MacEvoy Co. as principal (hereinafter called MacEvoy Co.), and Aetna Casualty and Surety Company, as surety, under the Miller Act, 49 Stat. at L. 793, 794; 40 U. S. Code, Section 270a-d (printed as Appendix A to Petitioners' Brief, pp. 33-36) in connection with a contract dated June 3, 1941, between the United States of America, acting through the Federal Works Administrator, and MacEvoy Co. for the construction of a defense housing project near Linden, New Jersey. Such contract, as is indicated by the complaint (R. 4), was on a "cost plus fixed fee" basis.

The substance of the complaint (R. 3-6) is that MacEvoy Co. purchased from one James H. Miller & Company, certain building materials for such project, that such materials were obtained by Miller & Company from the plaintiff (respondent herein), and that Miller & Company has failed to pay plaintiff a balance of $12,033.49. There is no allegation that Miller & Company agreed to perform or did perform any part of the work on said construction project. Neither is it disputed that MacEvoy Co. paid its materialman, Miller & Company, in full (R. 18-19).

Defendants (petitioners herein) moved to dismiss the complaint (R. 7) for failure to state a claim on which relief could be granted, which motion was granted by

District Court Judge Fake with an opinion (R. 8-14). An order and decree (R. 15) of the District Court dismissing the complaint was entered April 5, 1943, which order and decree was reversed by the Circuit Court of Appeals with an opinion (R. 21-29), and order of reversal filed August 13th, 1943 (R. 30). Defendants' petition for rehearing (R. 31-42) was denied on September 20th, 1943 (R. 43).

Defendants' petition to this Court for writ of certiorari to the Third Circuit Court of Appeals was granted by order dated December 13, 1943 (R. 45).

Questions Presented to This Court by the Petition for a Writ of Certiorari.

(1) Whether a third person (the "use plaintiff"), supplying material to a materialman (Miller & Co.) who in turn furnishes the same to the principal contractor (MacEvoy Co.) may recover against the principal contractor and its surety under the payment bond furnished pursuant to the Miller Act where

(a) No contractual relationship, express or implied, exists between said third person and the principal contractor, and

(b) No contractual relationship exists between said third person and any subcontractor performing any part of the work under the public contract.

(2) Whether the decision of the Circuit Court of Appeals is not directly contrary to the plain legislative intent as shown both by the language of the Miller Act and the legislative history leading up to its enactment.

(3) Whether the construction placed upon Section 2(a) of the Miller Act (40 U. S. C. Sec. 270b(a)) by the Circuit Court of Appeals does not result in subjecting Government contractors to an indeterminable and unlimited possible liability under the payment bond as against a definite standard of liability limited to liability to persons having contractual relationship, express or implied, with the principal contractor, or direct contractual relationship with a subcontractor.

(4) Whether the word "subcontractor" as used in the first sentence of said Section 2(a) of the Miller Act includes a mere materialman performing no work or labor.

Summary of Argument.

The Miller Act, after providing that government contractors shall furnish both a performance bond and a payment bond (Secs. 1, 2, pp. 33, 34, App. A) sets forth in Section 2(a) (pp. 34, 35, App. A) the conditions precedent to the right to sue upon the payment bond, which section includes the following proviso:

> "Provided, however, that any person having *direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond* shall have a right of action upon the said payment bond upon giving written notice" etc. (Italics ours.)

It is the contention of the petitioners that the right to sue upon the payment bond furnished by the contractor under the Miller Act is limited to persons dealing directly or under implied contract with the prime contractor or to persons (provided requisite notice is given)

dealing directly with a subcontractor of the prime contractor, and that the protection of the bond is not extended to persons, such as the respondent, who is a mere vendor to a materialman. In support of this contention petitioners make the following arguments:

A construction of the statute so as to permit recovery by remote claimants such as the respondent

(1) Is contrary to the plain language of the Miller Act and particularly the limitation contained in the proviso set forth in Section 2(a) thereof.

(2) Would ascribe to Congress an absurd intention, viz., requiring notice from those in privity with the contractor or subcontractor but requiring no notice of claims of the remotest persons, of whose interest the contractor could otherwise have no knowledge.

(3) Would render the statute unenforcible and lead to consequences that could not reasonably be intended by Congress, namely,

(a) Protection of indefinite and indeterminate classes of claimants and

(b) Unwillingness of solvent contractors to undertake government contracts—except at increased cost to the government—by reason of the unlimited liability which would be imposed in favor of the remotest claimants, against which the contractor could have no suitable protection.

(4) Is in conflict with the legislative intent as evidenced by the legislative history of the Act, including the earlier statute, the Heard Act (App. B, pp. 37-39), and the Congressional Committee hearings and reports thereon.

(5) Is in conflict with the weight of authority con-

struing analogous State public works statutes in this country, as well as the established meaning of the word "subcontractor" in building law and as construed in statutes *in pari materia* such as the mechanics' lien law statutes.

POINT I.

The proviso in Section 2(a) of the Miller Act excludes respondent from the classes of persons entitled to sue upon the payment bond.

A. The Act, by Clear and Unambiguous Language, Precludes Recovery by Respondent.

Even without resort to extrinsic aids to construction such as the Committee Reports, it is clear that Congress, after using broad, general language describing the field covered by the legislation, has clearly restricted and qualified the scope of the Act by limiting the right to sue to persons dealing directly with the contractor and to persons, who—lacking the requisite contractual relationship with the prime contractor—have direct contractual relationship with a subcontractor, and who give the statutory notice. This limitation and qualification is accomplished by the language of the proviso in Section 2(a), *supra*.

Interpreting the statute in this manner, effect is given to all parts thereof and no part may be said to be inconsistent with the other. If this be so it is not pertinent for the respondent to urge that Congress might have used a better combination of words or employed more skilled draftsmanship to accomplish this purpose, and that, therefore, respondent's construction which would render the proviso inconsistent with the preceding portions of the Act, must be adopted.

In our opinion the general words of the statute, namely:

> "Every person who has furnished labor or material in the prosecution of the work * * *"

refer and apply to persons dealing with the prime contractor, and as the Act protects all such persons whether they be laborers or materialmen the use of general terms is justified. We believe the Court, as well as the respondent, will agree that these persons, supplying labor or material directly to the prime contractor, are protected even though no notice is given and even though their relationship to the contractor may be only by implied contract. Yet, even though this is indisputable, the fact that notice is not required from such persons and the fact that implied contract will satisfy the requirement of privity, is only determined by reference to the proviso in Section 2(a).

Why, then, should the proviso be ignored or distorted when it goes one step further and states, in effect, that another class of persons may sue upon the bond, namely, those in privity with a subcontractor, but that, unlike those dealing with the contractor, such persons must give notice and only direct and not implied contract will in such cases satisfy the requirement of privity?

A construction of the language of the proviso as a qualification and restriction on the broad general language preceding, thereby limiting the right to sue to the classes of persons named, is in accord with the applicable principles of statutory construction referred to in *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, in which the Court said at page 208:

> "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase*, 135

U. S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner* v. *United States*, 195 U. S. 100, 125. *In re Hassenbusch*, 108 Fed. 38. *United States* v. *Peters*, 166 Fed. 613, 615. The construction contended for would violate the general rule that, if possible, effect shall be given to every clause and part of a statute. *Market Co.* v. *Hoffman*, 101 U. S. 112, 115. *Ex Parte Public National Bank*, 278 U. S. 101, 104."

The Circuit Court of Appeals obviously had considerable difficulty in its attempt to harmonize this proviso with other portions of the Act without admitting it to be a limitation upon the general language previously used, saying (R. 26):

> "It is true that this provision relied on by the lower court appears to be in conflict with the remainder of the statute. But that is no reason why this single provision should be controlling to the exclusion of (and at the expense of) the other terms of the Act."

The fallacy of such argument is that such provision is only irreconcilable if given the construction sought by respondent and adopted by the Circuit Court. It is not inconsistent if construed as a proviso limiting and restricting the broader terms preceding it.

The Circuit Court, apparently realizing that its construction of the statute, according to the broad purposes which it inferred from earlier legislation, since repealed, and cases decided thereunder, left the proviso in Section 2(a) without coherent meaning, disposed of this language by stating that the clause was not a true proviso (R. 28). Accordingly, to give meaning to the words used by Congress it was necessary for the Circuit Court to hold (R. 28) that the word "subcontractor" as used in Section

2(a) should not be restricted to its usual meaning but should be deemed to include materialmen.

We shall show in a subsequent point that the word "subcontractor" was intended by Congress to have its usual meaning, *i. e.*, one performing by agreement with the contractor a portion of the principal contract and accordingly furnishing labor and materials or labor alone, directly to the contractor.

So far as the Circuit Court's holding that the language in question "is not a *proviso* as that term is technically defined" (R. 28) is concerned, we do not believe it necessary to indulge in lengthy argument. It is our contention, in this point, that construction of the section according to its plain language, must ascribe to the words in question the effect of limiting and defining the persons entitled to sue upon the bond, and that this is the only construction which, without resort to extrinsic aids, reconciles and gives logical effect to all parts of the statute. In subsequent parts of the argument it will be shown that reference to factors outside the statute itself confirm that such was the legislative intent.

While the meaning of the particular words in Section 2(a) of the Act has never been previously determined by this Court, it is significant that Chief Justice Hughes in *Fleisher Engineering and Construction Co. v. U. S. for Use and Benefit of Hallenbeck*, 311 U. S. 15, expressly referred to this language as a *proviso*, saying at pages 18, 19:

> "The *proviso*, which defines the condition precedent to suit, states that the material-man or laborer 'shall have a right of action upon the said payment bond upon giving written notice to said contractor' within ninety days from the date of final performance." (Italics ours.)

B. The Decision of the Circuit Court Violates the Rule That a Construction Imputing to Congress an Absurd Intent Should Not Be Adopted.

The rule above stated was well established in this Court even at the date of the decision in *United States* v. *Kirby*, 74 U. S. 482, in which it was said, at page 486:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character."

See also *Kohlsaat* v. *Murphy*, 96 U. S. 153, 160.

The absurd result flowing from the construction adopted by the Circuit Court is obvious. The statute requires notice only from one class of claimants, namely, those "having direct contractual relationship with a subcontractor." If the statute be considered as protecting all persons who furnish labor or materials in the prosecution of the work, no matter how remote their relationship to the prime contractor, we have a situation where Congress has imposed a requirement of notice upon persons having direct contractual relationship with a subcontractor but has required no notice to be given by the most remote claimants such as the manufacturer whose goods, after passing through multiple processing operations and distribution agencies, are eventually incorporated into the work. Certainly no such absurd intention may reasonably be imputed to Congress.

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable interpretation consistent

with their words and with the legislative purpose." *Haggar Co. v. Helvering*, 308 U. S. 389, 394.

The above citation from the opinion of Mr. Justice Stone shows that the Court will depart even from the literal meaning of words to prevent absurd consequences. In the present case, as we have shown, the acceptance of the words of the statute according to their plain meaning effects a reasonable result, whereas it is the refusal of the Circuit Court to accept such literal meaning, and its consequent strained and belabored construction which leads to this absurd result.

The Circuit Court in its opinion gave only passing notice to the language of the proviso and no consideration at all to the important question of notice as affected by its holding, stating (R. 27, 28):

> "We prefer to rest our opinion upon the broader considerations heretofore discussed."

which considerations dealt only with the broad purposes that court felt should be ascribed to Congress. It may be that the Circuit Court did not fully perceive the effect which such construction would have upon the question of notice required by the language of the proviso, or felt that the question of notice was unimportant. This Court, however, has indicated that notice prescribed by the statute is a condition precedent to the right to sue.

> *Fleisher Engineering & Construction Co. v. U. S. for Use of Hallenbeck*, 311 U. S. 15;
>
> See also *United States for Use and Benefit of American Radiator & Standard Sanitary Corporation v. Northwestern Engineering Co.*, 122 F. 2d. 600.

Accordingly, a construction of the statute, which would result in absurdity so far as the important requirement of notice is concerned by exempting from such requirement remote claimants whose claims could not otherwise be known to the contractor, must be rejected.

C. The Construction Adopted by the Circuit Court Would Render the Statute Unworkable and Lead to Consequences That Could Not Reasonably Have Been Intended by Congress.

The logical effect of the decision below is that all persons, without qualification or restriction, whose labor or materials have in any way contributed to the public work undertaken by the contractor may sue upon the payment bond. Under such holding there is no line of demarcation, but the door is opened to suits by an indeterminable and unlimited class of possible claimants. These would include materialmen, jobbers, distributors, supply houses, manufacturers, processors, etc. no matter how remote their relationship to the work. It would also necessarily include their respective employees, laborers and others who can in any sense be said to have furnished any part of the materials entering into the public project or expended any labor thereon.

This result, which would obviously render the statute unworkable, must follow if the proviso in Section 2(a) is to be denied any restrictive or qualifying force and if the word "subcontractor" therein is to be distorted from its ordinary meaning so as to include a materialman. There is no other language of limitation in the Act and the all-inclusive language "Every person who has furnished labor or material" would be the only criterion.

Various courts, in analogous cases have held that such an intent, rendering the statute unworkable, will not be

imputed to the legislature. In *Ewen* v. *Thompson-Starrett Company*, 208 N. Y. 245, the New York Court of Appeals held that the language of Section 4 of the Labor Law, requiring prevailing wage rates to be paid in connection with public works contracts "to all classes of such laborers, workmen or mechanics upon all such public works, or upon any material to be used upon or in connection therewith" under penalty of cancellation of the contract, did not apply to the wages paid to quarrymen and stonecutters of a Maine subcontractor. The Court said at pages 248, 249:

> "A single sentence of the statute, literally construed, would require the prevailing rate of wages at the job to be paid the workmen on all materials entering into it down to the nails, screws and bolts. As the late Mr. Justice Houghton well observed in the *Bohnen* case, it 'would follow the iron beams for the building to the mines, the woodwork to the logging camp, and the stone to the quarry'."

The New York Court of Appeals refused to be led into the error of the Circuit Court in this case, namely, extending the statute far enough to cover the instant case without concern for the difficulties following adherence to such construction in other cases, saying at page 249:

> "There is no middle ground between a literal construction leading to the result just indicated and a reasonable construction to accomplish the purpose evidently intended."

See also:

> *Bohnen* v. *Metz*, 126 App. Div. 807, aff'd 193 N. Y. 676.

Similarly, the Court of Appeals of the District of Columbia, in a case involving the District public works

statute which was identical with the Heard Act (repealed and superseded by the Miller Act), refused to adopt a construction which would permit a vendor of a materialman to sue upon the bond, being of the opinion that such a construction would "establish a rule resulting in confusion". *Continental Casualty Co.* v. *North American Cement Corp.*, 91 F. 2d. 307, 308.

The same compelling argument has been relied upon by State courts in precluding recovery by vendors to materialmen under State public works statutes. In *Garbutt* v. *Chappe, et al.*, 131 Cal. App. 284, 21 Pac. (2d) 594, the court said at page 598:

> "The statute would be impracticable of enforcement if one who supplied materials to a materialman could recover on the bond, as such a holding would continue indefinitely the chain of potential claimants."

The impracticability of the statute under the Circuit Court's construction is, however, more apparent if we consider its adverse effect upon letting and performance of government contracts. The surety company bond is, of course, no protection to the prime contractor since he remains primarily liable. If then an unlimited liability to an indeterminable number of potential claimants is to be imposed upon the contractor, solvent contractors will refuse to bid on government contracts or will bid only upon a basis which will take into account such extraordinary risks.

Under the Circuit Court holding a government contractor would be unable to protect himself and would accordingly be forced to increase the amount of his bid to cover this indefinite liability, with consequent increased cost to the government.

The taking of a bond from subcontractors would be no protection as it would be impossible to determine the persons and liabilities to be covered. See *Baker, et al.* v. *Yakima Valley Canal Co.*, 77 Wash. 70, 137 P. 342, 345. The respondent has attempted to answer this argument by citing *Hill* v. *American Surety Co.*, 200 U. S. 197, and *Mankin* v. *United States to the Use of Ludowici Celadon Co.*, 215 U. S. 533, 540, both of which cases were decided under the Heard Act. In the *Hill* case the court said at page 204:

> "It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure."

This citation defeats respondent's own argument, for in those cases the Supreme Court was dealing only with the rights of persons supplying labor or material to a subcontractor in the ordinary sense. Since such simple method of protecting the contractor would not be feasible if more remote persons could sue upon the bond, the language used by the Court implies its understanding that even under the Heard Act no rights were conferred on persons more remote than those dealing with a subcontractor.

If such unlimited liability to "Every person who has furnished labor or material" was the true purpose of the Act, the risk of bidding upon public contracts would be prohibitive. As was said in *Ewen* v. *Thompson-Starrett Co.*, 208 N. Y. 245, 250:

> "If the act is to be thus construed, it should have been entitled 'An act to discourage the undertaking of public works'."

The contract in the instant case was on a "cost plus fixed fee" basis (R. 4). Under such contracts the government reimburses the contractor for the cost of the work, the contractor's fee being established on the assumption that the contractor will come out whole and does not contemplate that such fee shall be diminished by such extraordinary risks as would be imposed upon the contractor under the Circuit Court holding. This has been recognized by the Comptroller General who has said that the cost-plus-fixed-fee contract "* * * contemplates that the actual cost of the whole work and the risk thereof are to be assumed by the Government; that is that the contractor is to come out whole regardless of contingencies, in performing the work in accordance with the contract and the directions and instructions of the contracting officer, plus only a limited fixed fee as compensation for services, general overhead, use of the contractor's own or borrowed money and profit", and that the comparatively small fixed fee is not intended to compensate the contractor for the risks and contingencies of work of such character and magnitude which ordinarily are assumed by the contractor and covered by the contract price. 20 Comp. Gen. 632 at 636, 637 (Dec. B-15593).

Obviously, under this type of contract, the contractor will require a fixed fee large enough to afford him reasonable protection against payment of claims to the most remote persons. Also added to the cost of the work—and ultimately borne by the Government—would be the greatly increased cost of the premiums for writing such bonds exposing the surety company to possible unlimited liability.

A further undesirable consequence stemming from the lower court's holding is the possible liability of the Government under cost-plus-fixed-fee contracts to reimburse the prime contractor for losses sustained through suits by remote claimants. Such reimbursement would be in ac-

cord with the Comptroller General's opinion, *supra* (Dec. B-15593), to the effect that, under such contracts, it is contemplated that the contractor shall come out whole and shall not be obliged to bear extraordinary risks. Certainly, however, Congress could not have intended to put the Government in such a position.

In view, therefore, of these consequences resulting from the Circuit Court's decision namely, that it renders the statute impracticable, and unworkable, leads to hardship, injustice and absurdity, not only from the viewpoint of the contractor but also of the Government, such construction should be rejected."

Burnet v. *Guggenheim*, 288 U. S. 280, 285;
Sorrells v. *United States*, 287 U. S. 435, 446.

POINT II.

The construction adopted by the Circuit Court is contrary to the intent of Congress as evidenced by the Legislative history of the Act.

The Miller Act, enacted in 1935, supplanting earlier legislation known as the Heard Act (printed as App. B to this brief, pp. 37-39; 28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L. 1167; 40 U. S. Code 270 (5b)), requires a payment bond for protection of laborers and materialmen, as well as a performance bond for protection of the United States. The Heard Act required only a single bond under which the United States had the sole right in the first instance to bring suit within a prescribed time and have claims of various claimants adjudicated. If no suits were brought by the United States, claimants could institute suit within six months following completion and final settlement of the contract.

The Heard Act, after providing for the usual penal bond of performance, specified that it should contain "the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract;" It did not contain any language such as that set forth in the proviso contained in Section 2(a) of the Miller Act.

Accordingly, at an early date, this Court was called upon to determine whether the Heard Act protected persons supplying labor or materials to a subcontractor of the prime contractor. *United States for Use of Hill* v. *American Surety Co.*, 200 U. S. 197; *Illinois Surety Company* v. *John Davis Company*, 244 U. S. 376. In those cases, as well as similar cases, this Court held that any person furnishing labor or material to a subcontractor of the principal contractor was covered by the bond,—a perfectly understandable construction in view of the fact that subcontractors are persons in direct contractual relationship with the prime contractor and independently undertake a portion of the work prescribed by the contract, and also in view of the fact that the Heard Act contained no language of limitation such as the proviso in the Miller Act. The Supreme Court, however, has never under the Heard Act gone beyond that construction and has never held that, even under the Heard Act, a vendor to a materialman had any right to recover on the bond.

The Circuit Court and the respondent, however, have relied upon the broad language used by this Court in construing the Heard Act as applicable to persons dealing with subcontractors, as authority for giving unlimited effect to the provisions of the Miller Act, despite the qualifying language contained in the Miller Act and despite the fact that this Court had never given such effect to the Heard Act.

In the absence of Supreme Court decisions under the Heard Act going beyond protection of persons dealing with subcontractors, the Circuit Court and respondent have placed great emphasis upon the decision in *Utah Construction Company, et al.* v. *United States*, 15 F. 2d. 21, and upon this Court's denial of certiorari therein, 273 U. S. 745. That case purportedly stands for the proposition that, under the Heard Act, a vendor to a materialman is protected. That case has no controlling weight here, not only because it was decided under a different statute but also because the evidence submitted and the findings of the lower court, after trial of the issues in that case were sufficient for the Circuit Court to hold that the persons whose claims were allowed were either subcontractors or persons dealing with subcontractors, the court saying at page 24 of its opinion:

> "The fact that the contract with Paul provided for compensation computed upon the quantity of material transported does not necessarily affect the question; nor, indeed, would it exclude his relationship as that of a subcontractor. * * * *But as he did supply material and labor* which were used, whether he be called a materialman or a subcontractor supplying labor is not of vital importance, for the statute is broad enough to afford protection to him and relator." (Italics ours.)

The denial of certiorari in that case does not, of course, import an expression of opinion by this Court upon the merits of the case. *United States* v. *Carver*, 260 U. S. 482, 490. As was said in an article in 49 Harvard Law Review, 68, 82, of which Mr. Justice Frankfurter was co-author,

> "Jurisdiction upon certiorari is discretionary; denial of the writ, of course, implies a judgment not

that the decision below is right, but rather that, right or wrong, there is insufficient ground for its review."

Such, then, was the status of public works bonds when, in 1935, the subcommittee of the Committee on the Judiciary of the House of Representatives, under the chairmanship of Rep. Miller, for whom the Act is named, began extended hearings on the bills resulting in passage of the Miller Act. The Heard Act, as from time to time amended, had been in effect for more than forty years and had been frequently passed upon by the Supreme Court but had not been extended to persons more remote than those dealing directly with subcontractors.

References to the Committee hearings and report show that it was the definite intention of Congress not to extend the protection of the bond to persons more remote than those under direct contract with a subcontractor. This Court has frequently recognized that such references are entitled to great weight.

United States v. *Wrightwood Dairy Co.*, 315 U. S. 110, 125;
McLean v. *United States*, 226 U. S. 374, 380;
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320, 333.

The hearings were opened by Rep. Miller who, after reciting the bills to be considered, stated:

"All these bills deal with the same general subject; and it was the thought of the sub-committee that we would like to have the reaction and opinion of members in reference to those bills that deal with the general subject of requiring *a bond for the benefit of laborers and materialmen who deal with subcontractors* on public works." Hearings before Committee on the Judiciary, House of Rep., 74th Con-

gress, 1st Sess. U. S. Gov't Printing Office #143338. (Italics ours.)

We thus find the Chairman of the sub-committee, and the man for whom the Act is named, stating at the outset his understanding that the persons intended to be covered were those dealing with subcontractors. Moreover, he could not reasonably have intended that word to include materialmen for he has, in the same sentence, referred to materialmen as being those who deal with subcontractors.

From this and other statements made at the House Committee hearings it is evident that the Committee, as well as those appearing before it, understood that there was no intent to extend the classes of persons beyond those who had been protected under the Heard Act, and the decisions of this Court construing the same. For example, it was pointed out that the new legislation would not result in an increase in bond premiums,—a conclusion which would be inconsistent with extension of protection to the most remote persons. See Report of Hearings, pages 26, 29. Again, at page 62, when the question was raised whether labor of subcontractors all the way down the line would be covered,—a situation properly characterized as involving an insurance policy rather than a bond,—Chairman Miller made it clear that such result was not intended.

If there was any doubt that the Committee intended the proviso in Section 2(a) to be a limitation and restriction against remote claims it is removed by the circumstances attending the "reporting out" of the bill. Among the bills considered was H. R. 6677. This bill was practically identical with H. R. 8519 which was enacted into law. However, the proviso in 2(a) of H. R. 6677, was capable of the construction contended for by

respondent. (Reprinted at R. 41.) This was corrected in H. R. 8519 (R. 42) which was the bill finally reported and which is now the Miller Act. The correction was made by inserting the present language requiring direct contractual relationship with a subcontractor in the absence of contractual relationship with the principal contractor.

The House Committee's report, which was unanimous (Report No. 1263), contained the following language:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor but that is as far as the bill goes. *It is not felt that more remote relationships ought to come within the purview of the bond.*" (Italics ours.)

As the proviso in Section 2(a) is the only language of limitation in the Act, it is clear that the above quotation must have reference to that clause. The Senate Judiciary Committee held no hearings on the bill but adopted in full the House Committee's report, including the above quotation. No debate was had in either the House or the Senate, the bill being passed upon the identical reports of their respective committees (Senate Report No. 1283). (Cf. House Proceedings, Cong. Rec., Vol. 79, Part 11, p. 11702; Senate Proceedings, Cong. Rec., Vol. 79, Part 12, p. 13382.)

Despite this clear background preceding adoption of the Act, the respondent and the Circuit Court (R. 26) have seized upon a remark made in the Senate by Senator Burke at the time of enactment, as controlling. (Cong. Rec., Vol. 79, Part 12, p. 13382.) Senator Burke, in introducing the bill, stated:

> "Mr. President, this bill proposes to amend what is known as the 'Heard Law'. It provides, in the

> case of contracts with the Government in an amount more than $2,000 that the contractor shall be required to give two bonds instead of one, as at the present time. Under the present law a performance bond is given for the protection of the Government. This bill would amend that law by requiring an additional bond, a payment bond, for the protection of material men and laborers, subcontractors, and all who put forth their labor or furnish materials or incur expenditures in connection with the work.
>
> The House Judiciary Committee held hearings on the bill, all the different groups were represented, and this bill was finally passed by the House. The Senate Committee did not hold any hearings."

There is certainly nothing in this language to support respondent's contention. Senator Burke was merely stating, in general terms, his understanding of the bill, particularly with respect to the procedural improvement over the Heard Act, namely, the requirement of a payment bond in addition to the performance bond. He also pointed out that no hearings were held by the Senate Committee, but that all such study of the proposed legislation was made by the House Committee. Accordingly, there is nothing in his statement which can be said to controvert the statement in the reports of both the House and Senate Committees, which report he personally had subscribed and approved.

Moreover, as this Court has frequently pointed out, such statements made on the floor of Congress are of little, if any, effect in determining the intent of Congress, particularly where such statements are not in accord with the report of the Committee having charge of the bill.

United States v. *Wrightwood Dairy Co.*, 315 U. S. 110, 125;

Lapina v. *Williams*, 232 U. S. 78, 89, *et seq.*;

Accordingly, we find that the entire legislative history preceding and leading up to the enactment of the statute is in direct contrast with the Circuit Court's conclusions, not in a single or isolated instance, but in many respects, the cumulative effect of which show beyond doubt that the lower court has misinterpreted the intent of Congress. The evidences of Congressional intent which the Circuit Court has disregarded may be summarized as follows:— (a) The fact that the Miller Act merely represented a procedural improvement over the Heard Act, which Act had never been interpreted by this Court as protecting persons beyond those in privity with the prime contractor or subcontractor. (b) The extended hearings conducted under the chairmanship of the author of the Act contain adequate proof that no extension of the bond to cover remote persons was intended. (c) The Committee rejected a bill which might have left open to judicial construction the questions here involved and recommended and reported a bill which contained clear language of limitation. (d) The Committee Report, prepared and adopted by the House Committee, and unanimously accepted by the Senate Committee, stated in definite terms that persons dealing with subcontractors were protected and that "It is not felt that more remote relationships ought to come within the purview of the bond". (e) The House and Senate acted without debate and in full reliance on the Committee's Report, containing such express statement as to limitation of scope of the bond.

In view of all these evidences confirming the intent of Congress it is difficult to see how the decision of the lower court can be sustained relying, as it does (R. 26) so far as the legislative background is concerned, solely

upon the foregoing statement of Senator Burke, whose acquiescence in the Committee Report is much more determinative of his understanding than his general statement made on the floor of the Senate where the question now being considered had not been raised.

POINT III.

The decision of the Circuit Court is in conflict with the ordinary and established meaning of the word "subcontractor" in building law and the weight of authority construing analogous state statutes.

It was, of course, necessary for the Circuit Court, in order to support its decision, to hold that the word *subcontractor* as used in the proviso in Section 2(a) also meant *materialman* (R. 28, 29), despite the rule that words of a statute should be interpreted according to their ordinary and usual meaning, as pointed out by Mr. Justice Roberts in *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560:

> "The rule which must be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' *Levy's Lessee* v. *McCartee*, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' *Maillard* v. *Lawrence*, 16 How. 251, 261. And see *United States* v. *Buffalo Gas Co.*, 172 U. S. 339, 341; *United States* v. *First National Bank*, 234 U. S. 245, 358; *Caminetti* v. *United States*, 242 U. S. 470, 485. As was said in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370, 'the plain, obvious, and rational meaning of a statute, is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard

> case and the ingenuity and study of an acute and powerful intellect would discover.'"

This is particularly true with respect to words having an established significance by usage in the trade. In the building trades the words *subcontractor* and *materialman* have always had distinct and separate meanings, designating different classes of persons.

> "The term 'subcontractor' has a well defined meaning in building contracts and as used in its technical sense it means one who takes from the principal contractor a specific part of the work and does not include laborers or materialmen." 9 Corpus Juris 694.

It is not to be presumed that Congress, after exacting study by its Committees, would have used such an important word, in a statute dealing solely with building contracts, in a loose sense and one not generally recognized by the building trades.

We have been unable to find any decision wherein this Court had occasion to define the words "subcontractor" and "materialman". The case of *U. S. Fidelity & Guaranty Co.* v. *U. S. for Use and Benefit of Golden Pressed & Fire Brick Co.*, 191 U. S. 416, relied on by respondent, is certainly not such a case as no such issue was there involved. It is, however, reasonably certain, that, even apart from the instant case, this Court will be called upon with increasing frequency to determine questions requiring a precise application of the meaning of these words. This is foreshadowed by the unprecedented bulk of building contracts to which the Government is now a party and which it will undoubtedly enter into during the post-war period. The decision of the Circuit Court, if permitted to stand, would constitute an embarrassing

precedent to the proper determination of future cases, being in conflict with the general understanding as to the meaning of these words.

The Government, itself, has entered into innumerable contracts with the conception that subcontracts are essentially different from material purchases, requiring, in the case of subcontracts, formal contracts, but handling the latter through the medium of purchase orders. *In the very project here involved the Comptroller General had occasion to consider the effect of subcontracting upon determination of the fixed fee of petitioner herein* (22 Comp. Gen. 14, Dec. B-24602). It is clear from that opinion that the Government shares the common belief of the building trades that subcontracts relate to performance of a portion of the work originally undertaken by the prime contractor. See also 20 Comp. Gen. 533, 536 and 21 Comp. Gen. 813, 816.

The state and federal courts have frequently had occasion to determine the meaning of the word "subcontractor" and have almost uniformly held that it means one supplying labor and materials or labor alone to the principal contractor and does not include a mere materialman.

Staples v. *Adams, Payne & Gleaves, Inc.*, 215 Fed. 322, 327;
Neary et al. v. *Puget Sound Engineering Co. et al.*, 114 Wash. 1, 194 Pac. 830;
Boisot, Mechanics Liens, §223.

Indeed, so well is the meaning of this word understood in the building trades that decisions may be found by the courts of practically every state, recognizing that a subcontractor is one who undertakes by agreement a part of the *work* specified in the principal contract, and that a materialman furnishes merely materials, perform-

ing no part of the work. It is true that in some isolated instances and under the peculiar language of specific statutes, some courts have not recognized a distinction. Such a decidedly minority view, however, cannot be said to govern the common understanding in the trade. The pertinent inquiry in this case is what Congress intended and it seems clear that the ordinary meaning only was intended.

This becomes more evident if we consider the purpose of public works bonds. In *Irwin et al. v. U. S. to Use of Noland Co. Inc.*, 122 F. 2d. 73 (reversed on other grounds, 316 U. S. 23), decided under the Miller Act, the court said at page 76:

> "The Heard Act, as has often been said, was passed in recognition of the inability of subcontractors to take liens on the public property of the United States. Its practical effect was to substitute the required bond in place of the building on which the lien, in the case of non-public property, would attach."

It is reasonable, therefore, to suppose that Congress intended to include only those persons who would be entitled to a mechanic's lien if the contract was between private parties. However, under the general law of mechanics' liens as established in this country, respondent would have no right to a lien against the property if this were a private improvement.

> "* * * a person who sells materials to a material-man, who contracts either with the owner, or with the contractor, is not a 'material-man' within the meaning of the statute, and has no lien therefor, as the statute makes no provision for such lien." Bloom, Mechanics' Liens, Sec. 79.

Also in Boisot on Mechanics' Liens the author, having previously defined a materialman in the second degree

as one who, like Miller & Company in this case, furnished materials to a contractor, states without qualification at Section 256:

> "One who sells materials to a materialman in the second degree has no lien therefor."

The general rule is also stated in 40 Corpus Juris 143, as follows:

> "Persons furnishing material to materialmen are as a rule not entitled to a lien, although under some constitutional provisions a lien is allowed to them."

The policy of the lien law statutes and of the majority of public works statutes in not extending protection to the materialman's vendor is obvious. Apart from the difficulties implicit in the application of such a statute, the jobbers and supply houses which sell to materialmen have never been considered as a class requiring the solicitude of the legislature. They cannot, generally speaking, be classified with the laborer, mechanic or small materialman who must take their work where they find it and rely implicitly on the contractor or subcontractor. The supply-houses and distributors selling to the materialman are usually organizations capable of investigating the credit standing of their customers and, if they accept a poor risk, should not be made whole at the expense of the contractor who has fully met his obligation.

Long before the adoption of the Miller Act, payment bonds on public works were required by many state statutes. The state courts, in construing such statutes, have, by the weight of authority, denied recovery to vendors of materialmen.

> "* * * it is generally held that a remote materialman, *i. e.*, one furnishing materials to a mere materialman

rather than to a contractor or subcontractor, cannot recover on a public contractor's bond executed pursuant to a statute providing for a bond for the benefit of laborers and materialmen, although such materialman in turn sells the material to a contractor or subcontractor."

118 A. L. R. at p. 84.

The decisions in the state courts have advanced several reasons for denying relief to vendors of materialmen under public works statutes. All of these reasons are applicable here and may be summarized as follows:

(a) Such statutes are in *pari materia* with the mechanics' lien law statutes and are not intended to extend the class of persons to be benefited beyond those who would be protected by a mechanic's lien, in the case of a private improvement.

Neary et al. v. *Puget Sound Engineering Co., et al.*, 114 Wash. 1, 194 Pac. 830.

(b) The necessary privity does not exist between the obligor on the bond and the person who merely furnishes materials to a materialman, as distinguished from a person dealing directly with the contractor or dealing with a subcontractor who has direct privity of contract with the obligor.

City of St. Louis v. *Kaplan-McGowan Co.*, 223 Mo. App. 789, 108 S. W. (2d) 987.

(c) The word "subcontractor" as used in all of these statutes must be given its ordinary meaning and does not include a materialman in the ordinarily accepted sense;

Marsh v. *Rothey*, 177 W. Va. 94, 183 S. E. 914;
Huddleston v. *Nislar*, 72 S. W. (2d) 959 (Texas).

(d) The unwarranted extension of the statute to

persons furnishing materials to a mere materialman would create an unlimited class of potential claimants, making the enforcement of the statute impracticable and making it virtually impossible for the obligor or surety to protect themselves properly.

Garbutt v. Chappe, 131 Cal. App. 284, 21 P. (2d) 594.

Many other state cases upholding this majority view can be cited to the same effect. (See comprehensive annotation in 118 A. L. R. 57 at 84 *et seq.*)

Even though it may be argued that none of the state statutes is identical with the Miller Act, it must be presumed that Congress and its Committees had some familiarity with this great body of law affecting building contracts and intended the language used to be in harmony rather than in conflict with the bulk of the state statutes and decisions. The decision of the Circuit Court, if sustained, would create confusion in the interpretation of building contracts generally. This confusion would extend not only to questions arising under the Act but to the multiple questions which the federal courts must determine under government contracts. These contracts have been made and administered by the government representatives on the theory that the respective rights and liabilities of subcontractors and materialmen and the established meaning of such words is, under federal law, the same as under the general law of building contracts, as determined by custom in the building trades and by the preponderant weight of authority in the state courts.

CONCLUSION.

The order of the Circuit Court of Appeals should be reversed, and the order and decree of the District Court dismissing the complaint herein affirmed.

Respectfully submitted,

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APPENDIX A.

The Miller Act.

An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to Be Accompanied by a Performance Bond Protecting the United States and by an Additional Bond for the Protection of Persons Furnishing Material and Labor for the Construction, Alteration, or Repair of Said Public Building or Public Work.

49 Stat. at L. 793; Act Aug. 24, 1935, c. 642, §1, 40 USCA §270a. **Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half

the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §2, 40 USCA §270b. **Same; rights of persons furnishing labor or material.**

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at

the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

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40 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §3. 40 USCA §270c. **Same; right of person furnishing labor or material to copy of bond.**

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §4, 40 USCA §270d. **Same; definition of "person" in sections 270a, 270b and 270c.**

Sec. 4. The term "person" and the masculine pronoun as used in sections 270a, 270b and 270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

Sec. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C. title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

APPENDIX B.

The Heard Act.

(Repealed by the Miller Act, §5.)

40 USCA §270 (Aug. 13, 1894, c. 280, 28 Stat. at L. 278; Feb. 24, 1905, c. 778, 33 Stat. at L. 811; Mar. 3, 1911, c. 231, §291, 36 Stat. at L. 1167). **Bonds of contractors for public buildings or works; right of persons furnishing labor and material.**

Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said in-

terveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any

amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 483.

CLIFFORD F. MacEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

AGAINST

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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Brief in Opposition to Petition for Writ of Certiorari.

General Statement.

This action involves only a simple question of construction of the Miller Act (49 Stat. at L. 793, 794, 40 USCA §270a-d) in deciding which the Circuit Court of Appeals for the Third Circuit has followed the decisions of this Court construing the Miller Act and the earlier Heard Act (28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L. 1167, 40 USCA §270). The question arose on petitioners' motion to dismiss the complaint for failure to state a valid cause of action. The opinion of the Circuit Court of Appeals is reported in 137 F. 2d 565.

There is no conflict between the decision of the Circuit Court of Appeals herein and any decision of this Court or of another Circuit Court of Appeals.

Although the right of claimants situated like plaintiff herein to recover on the bond under the Miller Act has not been passed upon by this Court, this Court has held that claimants situated like plaintiff might recover on the bond under the Heard Act, for which the broader and more liberal Miller Act was substituted in 1935.

Summary Statement of Facts.

The allegations of the complaint, which are to be taken as proved on the motion to dismiss, show that petitioner Clifford F. MacEvoy Company (MacEvoy) made a contract with the United States of America, represented by the Federal Works Administrator, under which MacAvoy agreed to furnish the materials and perform the work necessary for the construction of 700 dwelling-units in a housing project (R. 3-4).

Pursuant to the Miller Act, MacEvoy, as principal, and petitioner, The Aetna Casualty and Surety Company (Surety), as surety, furnished a bond conditioned for the prompt payment of all persons supplying labor and material in the prosecution of the work provided for in MacEvoy's contract (R. 4).

MacEvoy thereafter contracted with James H. Miller & Company (Miller Company) to furnish building materials for the prosecution of the work provided for in MacEvoy's contract (R. 5).

The Miller Company, in turn, contracted with the use plaintiff, The Calvin Tomkins Company, to furnish certain building materials for the prosecution of the work (R. 5).

Plaintiff, with the knowledge, consent and approval of MacEvoy, furnished $47,119.14 of building materials

through the Miller Company for the prosecution of the work. Plaintiff received from the Miller Company $35,085.65 on account, leaving a balance of $12,033.49 with interest owing (R. 5).

When the Miller Company failed to pay plaintiff the balance, plaintiff duly notified MacEvoy and the Surety and thereafter duly brought this action (R. 6).

Issue Decided by the Circuit Court of Appeals.

The Circuit Court of Appeals held that plaintiff might recover from MacEvoy, the contractor, and the Surety on the Miller Act bond for materials furnished by plaintiff in the prosecution of public work through the Miller Company which had contracted with MacEvoy to furnish the materials.

POINT I.

The decision of the Circuit Court of Appeals herein is in accord with the provisions of the Miller Act and decisions of this Court construing the Miller Act and the earlier Heard Act.

The decision of the Circuit Court of Appeals herein is in accord with the language of the Miller Act. The first section of the Act, 270a, requires the contractor on a public building or a public work of the United States to furnish "a payment bond with a surety • • • for the protection of *all persons* supplying labor and material in the prosecution of the work provided for in said contract for the use of *each such person*" (Subdivision [a][2]; italics supplied).

The second section (270b) provides in part that "*Every person* who has furnished labor or material in the prosecution of the work provided for in such contract, in re-

spect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him" (Subdivision [a]; italics supplied).

The third section (270c) provides that *any person* who has supplied labor or materials for such work and who has not been paid may, upon making an affidavit to that effect, obtain a certified copy of the bond of the contractor and the contract for which the bond was given. (Italics supplied.)

The fourth section (270d) defines certain terms used in the Act.

The fifth section provides for the repeal of the Heard Act.

In the foregoing provisions from the several sections of the Miller Act, there is no limitation whatever placed on the persons who may recover on the contractor's bond except that they must be persons who have "furnished labor or material in the prosecution of the work".

The Circuit Court of Appeals, therefore, properly held that plaintiff, which furnished materials in the prosecution of public work, was entitled to recover under the provisions of the Miller Act.

Petitioners, however, argue that the proviso in Section 2 of the Act relating to notice amounts to an amendment of the other provisions of the Act so as to make them read, in effect, that only those persons who furnish

labor or materials to a contractor or subcontractor may recover on the bond.

The Circuit Court of Appeals, in holding that a subsidiary provision of the Miller Act should be construed so as not to obstruct and restrict the general purpose of the Act as expressed in its title and throughout its provisions, is in accord with the decision of this Court in *United States of America for the Use and Benefit of Alexander Bryant Company* v. *New York Steam Fitting Company*, 235 U. S. 327, 59 L. ed. 253 (1914) where this Court approved a similar construction of a similar proviso of the Heard Act by the Circuit Court of Appeals for the Third Circuit in *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429.

The Circuit Court of Appeals properly held that, even if the proviso in Section 2 were construed so as to amend the main provisions of the Act so as to limit recovery to persons furnishing materials to a contractor or subcontractor, plaintiff herein was entitled to recover for the reason that the Miller Company, through which plaintiff furnished the materials, having contracted with the contractor, was a subcontractor. In so holding, the Circuit Court of Appeals is in accord with this Court, which, in a case construing the Heard Act, used the word "subcontractor" several times in its opinion in referring to a company which had contracted with the contractor to supply bricks.

> *United States Fidelity & Guaranty Company* v. *United States for the Use and Benefit of Golden Pressed & Fire Brick Company*, 191 U. S. 416, 48 L. ed. 242 (1903).

Moreover, the Surety in this action, which was also the petitioner surety in an application to this Court for a writ of certiorari in *Utah Construction Company* v. *United*

States, 273 U. S. 745, 71 L. ed. 870 (1926), admitted in its petition in that case that a contract to furnish materials, such as the Miller Company had with MacEvoy, is sometimes called a "subcontract" (p. 7).

Thus, the decision of the Circuit Court of Appeals herein is in accord with the provisions of the Miller Act; and it is in accord with the Act even if it be deemed amended by the proviso in Section 2, as petitioners contend it should be.

The decision of the Circuit Court of Appeals herein is in accord with the decisions of this Court construing the Heard Act.

> *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203, 204, 50 L. ed. 437, 440, 441 (1906);
> *Illinois Surety Company* v. *John Davis Company*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211 (1917);
> *Fleischmann Construction Company* v. *United States of America to the Use of Forsberg*, 270 U. S. 349, 360, 70 L. ed. 624, 631 (1926);
> *Standard Accident Insurance Company* v. *United States to the Use of Powell*, 302 U. S. 442, 444, 82 L. ed. 350, 352 (1938).

This Court summed up its attitude with reference to the right of recovery under the Heard Act as follows in *Illinois Surety Company* v. *John Davis Company*, *supra*:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act" (pp. 380; 1211).

This Court said that in the construction of the obligation of the bond given pursuant to the Heard Act:

> "we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end;"
>
> *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203, 50 L. ed. 437, 440 (1906), *supra*.

The Heard Act was less liberal in its provisions than the Miller Act. The Heard Act allowed persons furnishing labor or materials to the *contractor* in the prosecution of public work to recover on the contractor's bond. The Miller Act, which was substituted for the Heard Act, permits *all* persons furnishing labor or materials in the prosecution of public work to recover. Thus, what this Court has said with respect to the right of recovery on the bond under the Heard Act would apply with even greater force to the right of recovery on the bond under the substituted Miller Act.

The decision of the Circuit Court of Appeals herein is in accord with decisions of this Court construing the Miller Act. This Court has said recently that the Miller Act is a substitute for the earlier Heard Act and, therefore, was intended to be highly remedial and must be liberally construed.

> *Fleisher Engineering & Construction Company* v. *United States*, 311 U. S. 15, 17, 85 L. ed. 12, 14 (1940).

In another recent decision construing the Miller Act, this Court said that the Miller Act enlarges the protec-

tion given to materialmen and laborers under the earlier Heard Act.

> *United States to the Use of Noland Company, Inc.* v. *Irwin*, 316 U. S. 23, 29, 86 L. ed. 1241, 1245 (1942).

In a footnote to the opinion of this Court in *United States to the Use of Noland Company, Inc.* v. *Irwin, supra*, reference is made to Congressional hearings on the several bills from which the Miller Act evolved. In the course of these hearings, Senator Burke, in the final discussion in the Senate stated without contradiction the purpose of the Miller Act as follows:

> "Mr. President, this bill proposes to amend what is known as the 'Heard Law'. • • • This bill would amend that law by requiring an additional bond, a payment bond, for the protection of material men and laborers, subcontractors, and *all who put forth their labor or furnish materials or incur expenditures in connection with the work.*" (Italics supplied.)
>
> *Vol. 79 Congressional Record*, Part 12, page 13382, Senate proceedings, 74th Congress, 1st Session (H. R. 8519).

The decision of the Circuit Court of Appeals herein, therefore, is in accord with the provisions of the Miller Act, the decisions of this Court construing the Heard Act and the decisions of this Court construing the Miller Act.

POINT II.

There is no conflict between the decision of the Circuit Court of Appeals herein and any decision of this Court or of another Circuit Court of Appeals or of the Court of Appeals for the District of Columbia.

There is no conflict between the decision of the Circuit Court of Appeals herein and the decisions of this Court construing the Miller Act or the earlier Heard Act.

United States for the Use of Hill v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906), *supra;*

Illinois Surety Company v. *John Davis Company*, 244 U. S. 376, 61 L. ed. 1206 (1917), *supra;*

Fleischmann Construction Company v. *United States of America to the Use of Forsberg*, 270 U. S. 349, 70 L. ed. 624 (1926), *supra;*

Standard Accident Insurance Company v. *United States to the Use of Powell*, 302 U. S. 442, 444, 82 L. ed. 350, 352 (1938), *supra;*

Fleischer Engineering & Construction Company v. *United States*, 311 U. S. 15, 85 L. ed. 12 (1940), *supra;*

United States to the Use of Noland Company, Inc. v. *Irwin*, 316 U. S. 23, 86 L. ed. 1241 (1942), *supra.*

There is no conflict between the decision of the Circuit Court of Appeals herein and any decision of another Circuit Court of Appeals. On the contrary, in *Utah Construction Company* v. *United States*, 15 F. 2d 21, certiorari denied 273 U. S. 745, 71 L. ed. 870 (1926), *supra*, the Circuit Court of Appeals for the Ninth Circuit went much further in allowing a recovery under the Heard Act than the Circuit Court of Appeals for the Third Circuit did in

this case in allowing a recovery under the Miller Act. The Court there permitted the recovery by a materialman who supplied materials to the vendor of materials to a subcontractor.

The defendant surety in that case, which is also the petitioner Surety herein, complained to this Court in its petition for a writ of certiorari that "The decision in effect wholly disregards the word 'contractor' implied in the phrase 'supplying *him* with labor or material'" (p. 8), referring to the language of the Heard Act. This Court, however, apparently found nothing in the decision of the Circuit Court of Appeals for the Ninth Circuit in that case, which was in conflict with its own decisions construing the Heard Act.

The decision of the Circuit Court of Appeals herein is not in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Continental Casualty Company* v. *North American Cement Corporation*, 91 F. 2d 307 (1937). The Court of Appeals for the District of Columbia held that the claimant in that case had supplied materials in the prosecution of public work under an agreement with the contractor to pay for those materials.

The Court of Appeals for the District of Columbia, in a dictum, indicated that, in construing the local statute of the District of Columbia, it would not go as far as this Court indicated it would go in construing the Heard Act, *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906), *supra*, or as far as the Circuit Court of Appeals for the Ninth Circuit actually did go in construing the Heard Act in *Utah Construction Company* v. *United States*, 15 F. 2d 21 (1926), certiorari denied, 273 U. S. 745, 71 L. ed. 870, *supra*.

The only conflict indicated is a possible *future* conflict between this Court and the Court of Appeals for the Dis-

trict of Columbia as to what would be the proper decision in a case involving facts which were not involved either in the case before the Court of Appeals for the District of Columbia or in the present case.

There is no conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit in *Utah Construction Company* v. *United States, supra,* and the decision of the Court of Appeals for the District of Columbia in *Continental Casualty Company* v. *North American Cement Corporation, supra.* Because of differences in the facts, the Court of Appeals for the District of Columbia itself stated that the questions before the Court in *Utah Construction Company* v. *United States, supra,* were academic so far as the case before the Court of Appeals for the District of Columbia was concerned (p. 309).

In every case arising under the Heard Act, recovery has been allowed to a claimant situated like plaintiff herein. There are no conflicting decisions or even conflicting dicta with respect to the right of recovery of such claimants.

POINT III.

Petitioners' argument that the decision of the Circuit Court of Appeals, allowing a claimant in the position of plaintiff to recover, would impose undue burden on a surety and would be contrary to the public interest, has no basis in fact in this case. Similar arguments have been considered and rejected by this Court.

Petitioners contend that the decision of the Circuit Court of Appeals in this case "opens the door to suits upon the payment bond by an indeterminable class of claimants" (p. 23). They fear that "the most remote claimants who may have contributed work or materials to some part of the completed project, even though such

contribution may have been in the manufacture or mining of materials many miles from the site and passing through the hands of numerous persons, such as miners, manufacturers, distributors, supply men, jobbers, vendors and materialmen before final incorporation in the work" (Brief, p. 24), may be permitted to recover on the contractor's bond as a result of the decision in this case.

The decision of the Circuit Court of Appeals in this case merely held that a claimant who supplies materials to a person who has contracted to furnish those materials to the contractor may recover on the bond.

The Court did not hold that persons having the remote relationships suggested by petitioners in their brief might recover on the bond.

The decision, therefore, does not raise any question as to whether the public interest is adversely affected by allowing remote claimants to recover, and petitioners' arguments in that connection are, therefore, beside the point.

In *Utah Construction Company* v. *United States*, 15 F. 2d 21, certiorari denied, 273 U. S. 745, 71 L. ed. 870 (1926), *supra*, the Circuit Court of Appeals for the Ninth Circuit allowed more remote claimants to recover on a bond under the Heard Act. The Surety herein argued to this Court in its petition for a writ of ceritiorari and in its brief in support thereof in that case that the decision of the Circuit Court of Appeals permitting a materialman who supplied materials to the vendor of materials to a subcontractor to recover would result in increased premiums on bonds and consequent increased cost to the Government and undue hardship on sureties. The Surety said:

> "If the view of the Circuit Court of Appeals (in the *Utah Construction Company* case) is correct it must necessarily follow that a contractor could not, in safety, so much as purchase a keg of nails and

pay for it without first satisfying himself at his own risk that the drayman who hauled it to the job of the vendor had been paid for his services, and that the wholesaler from whom the vendor purchased it had likewise been paid.

The application of such a rule to public contracts would be a novel thing and would involve such contractors in innumerable difficulties and disputes and might conceivably embarrass the government in inducing anyone to accept a contract for a public work."

Brief in support of petition for writ of ceriorari, pages 26-7, *Utah Construction Company* v. *United States*, 273 U. S. 745, L. ed. 870 (1926) *supra*.

This Court, after careful consideration of the arguments, denied the petition for a writ of certiorari in the *Utah Construction Company* case involving the Heard Act. The same Surety advances the same arguments in its present petition for a writ of certiorari.

The arguments have even less merit in the present case where the Circuit Court of Appeals for the Third Circuit did not go as far as the Circuit Court of Appeals for the Ninth Circuit did in the *Utah Construction Company* case, although the Act involved in the present case was not the Heard Act, but the broader and more liberal Miller Act.

The argument that a liberal construction of the Heard Act would impose undue hardship on the surety was addressed to this Court in *United States for the Use of Hill* v. *American Surety Co.*, 200 U. S. 197, 50 L. ed. 437 (1906), *supra*, and answered thus:

"It is easy for the contractor to see to it that he and his surety are secured against loss by requiring

those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure" (pp. 204; 441).

To the same effect is the later decision of this Court in *Mankin* v. *United States to the Use of Ludowici Celadon Co.*, 215 U. S. 533, 540, 54 L. ed. 315, 318 (1910).

Thus, petitioners' arguments respecting the public interest and undue hardship have been raised, considered and rejected by this Court in cases construing the Heard Act for which the Miller Act was substituted.

CONCLUSION.

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

BENJAMIN P. DEWITT,
Counsel for Respondent.

IN THE

Supreme Court of the United States

October Term, 1943.

No. 483.

CLIFFORD F. MacEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

AGAINST

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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TABLE OF CASES CITED.

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Petitioners,

AGAINST

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the District Court of New Jersey (R. 8-14) is officially reported at 49 F. Supp. 81. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 22-29) is officially reported at 137 F. 2d 565. The order of this Court granting petitioners a writ of certiorari (R. 45) is not yet officially reported.

Basis for Jurisdiction.

Jurisdiction is invoked by petitioners under Section 240(a) and Subsection 8(a) of the Judicial Code, as amended, 28 U. S. C. Sections 347 and 350, and the order of this Court, dated December 13, 1943 (R. 45) granting petitioners' petition for a writ of certiorari.

Statement of the Case.

This is an action on a bond given pursuant to the Miller Act, 49 Stat. at L. 793, 794, 40 U. S. C. A., §270a-d (printed as Appendix A to Respondent's Brief, pp. 36 to 39), brought in the United States District Court for the District of New Jersey against a contractor who contracted with the United States of America to construct a defense housing project at Linden, New Jersey, and the surety of the contractor (R. 3-4).

The allegations of the complaint which, on the motion to dismiss, are to be taken as proved, show that on June 3, 1941, defendant Clifford F. MacEvoy Company (MacEvoy), petitioner herein, entered into a written contract with the United States of America represented by the Federal Works Administrator, under which MacEvoy agreed to furnish the material and perform the work necessary for the construction of 700 dwelling-units in the housing project (R. 3-4).

Pursuant to the Miller Act, MacEvoy, as principal, and The Aetna Casualty and Surety Company (Surety), petitioner herein, as surety, furnished a bond, conditioned for the prompt payment of all persons supplyng labor and material in the prosecution of the work provided for in MacEvoy's contract (R. 4, 16-17).

MacEvoy thereafter contracted with James H. Miller & Company (Miller Company) for the furnishing of building material by the Miller Company for the prosecution of the work provided for in MacEvoy's contract (R. 5).

The Miller Company in turn contracted with the use plaintiff, The Calvin Tomkins Company, respondent herein, to furnish building material for the prosecution of the said work (R. 5).

Respondent, with the knowledge, consent and approval of MacEvoy, furnished $47,119.14 of building material through the Miller Company for the prosecution of the

said work. Respondent received from the Miller Company $35,085.65 on account, leaving a balance of $12,033.49 with interest owing (R. 5).

The Miller Company failed to pay respondent the balance. Respondent duly notified MacEvoy and the Surety, in accordance with the statute, within 90 days after it furnished the last of the material, of the amount of its unpaid claim (R. 6). Thereafter, and prior to the expiration of one year after the final settlement of MacEvoy's contract for the said work, respondent brought this action against MacEvoy and the Surety on their bond to recover the balance owing for the material furnished in the prosecution of the work under MacEvoy's contract with the United States of America (R. 6).

There is nothing in the complaint to show what, if anything, MacEvoy paid its subcontractor, the Miller Company (R. 3-6). Respondent, going outside of the allegations of the complaint, offered to the District Court the affidavit of an employee of MacEvoy to the effect that MacEvoy paid the Miller Company in full for all material furnished by the Miller Company (R. 18). Payment is disputed, contrary to petitioners' statement (Brief, p. 2), and will be an issue of fact at the trial.

Defendants (petitioners herein) moved on May 4, 1942 to dismiss the complaint on the ground that it failed to state a valid cause of action (R. 7).

In a memorandum opinion filed March 17, 1943, United States District Judge Fake granted petitioners' motion (R. 8). An order and decree dismissing the complaint was made and entered on April 5, 1943 (R. 15).

Respondent appealed from the order and decree of the District Court to the United States Circuit Court of Appeals for the Third Circuit.

In an opinion filed August 13, 1943, the Circuit Court of Appeals reversed the judgment of the District Court

(R. 22). On the same day, an order of the Circuit Court of Appeals reversing the judgment was made and entered (R. 30).

On September 20, 1943, the Circuit Court of Appeals denied petitioners' motion for a rehearing (R. 43).

By order dated December 13, 1943, this Court granted petitioners' petition for a writ of certiorari (R. 45).

Question Presented to This Court.

The question presented is: May respondent recover from a contractor with the United States of America pursuant to the Miller Act for material furnished by respondent in the prosecution of public work of the United States through another company which had entered into a contract with the contractor to furnish the material?

This case does not involve the right to recover of "the remotest claimants" or of "indefinite and indeterminate classes of claimants" as petitioners suggest (Brief, p. 5).

Summary of Argument.

The title and the text of the Miller Act state clearly that the Act protects all persons furnishing labor and material in the prosecution of public work.

The Circuit Court of Appeals properly held that the proviso in the second section of the Act relating to notice to the contractor and the procedure for giving such notice should not be so construed as to nullify the express provisions of the Act, including the express provision of the second section in which the proviso appears, that all persons furnishing labor and material are protected by the contractor's bond.

The bond given by petitioners, on which this action was brought, states clearly that it is for the protection of all persons supplying labor or material in the prosecution of the work.

Even if the Miller Act had expressly provided, as it does not, that only those persons who have furnished labor or material to the contractor or a subcontractor may recover on the bond, respondent which furnished material in the prosecution of public work through the Miller Company which had a contract with MacEvoy, the contractor, would be entitled to recover under the liberal construction given by this Court to the Heard Act and the Miller Act, as well as under the construction given by the courts of numerous states to similar statutes.

The Heard Act, which was repealed and superseded in 1935 by the Miller Act, provided that all persons supplying labor and material to the *contractor* in the prosecution of public work were entitled to recover on the contractor's bond. This Court, in construing the Heard Act, has held that all persons furnishing labor or material in the prosecution of the public work, even though not furnished directly to the contractor, were entitled to recover on the contractor's bond. This Court, in construing the Heard Act, has also held that a proviso in the Heard Act would not be so construed as to nullify the express provisions of the Act.

The Circuit Court of Appeals for the Ninth Circuit, in construing the Heard Act, held that a claimant which had supplied material to the vendor of material to a subcontractor was entitled to recover on the contractor's bond. This Court denied a petition for a writ of certiorari in that case.

This Court has held that the Miller Act is a substitute for the Heard Act and enlarges the protection given under the Heard Act to those furnishing labor or material in the prosecution of public work. The Circuit Court of Appeals properly refused to hold that the Miller Act narrows and restricts the protection which this Court has held is given under the Heard Act to all persons furnishing labor or material in the prosecution of public work.

This Court's liberal construction of the Heard Act has not resulted in, and the Circuit Court's similar construction of the Miller Act will not result in, the consequences feared by petitioners.

POINT I.

The title and the text of the Miller Act state clearly that the Act protects all persons furnishing labor and material in the prosecution of public work.

Petitioners would have the Court believe that the Miller Act "by clear and unambiguous language, precludes recovery by respondent" (Brief, p. 6). The fact is that the title and the text of the act in the plainest language permit recovery by respondent; and it is only by what the Circuit Court describes as "torturing the meaning" (R. 29) of a proviso in Section two of the Act that petitioners are able to raise any question at all.

The purpose of the Miller Act is indicated in the title of the Act as follows:

> "An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to Be Accompanied by a Performance Bond Protecting the United States and by an Additional Bond for the Protection of Persons Furnishing Material and Labor for the Construction, Alteration or Repair of Said Public Building or Public Work" (Appendix A, p. 36).

The Miller Act consists of five sections (Appendix A, pp. 36-39).

The first section (§270a) requires the contractor for a public building or public work of the United States to fur-

nish "a payment bond with a surety * * * for the protection of *all* persons supplying labor and material in the prosecution of the work provided for in said contract for the use of *each* such person" (Subdivision [a][2]; italics supplied). There is no qualification or restriction on the persons for whose protection the bond is furnished except that they must have supplied labor or material in the prosecution of the public work.

The second section (§270b) provides in part that "*Every* person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him" (Subdivision [a]; italics supplied). Again, there is no qualification or restriction except that the person must have supplied labor or material in the prosecution of the work.

The third section (§270c) provides that *any* person who has supplied labor or material for such work and who has not been paid may, upon making an affidavit to that effect, obtain a certified copy of the bond of the contractor and the contract for which the bond was given. Again, there is no qualification or restriction except that the person must have supplied labor or material in the prosecution of the work.

The fourth section (§270d) defines certain terms used in the Act.

The fifth section provides for the repeal of the Heard Act, 28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L.

1167, 40 U. S. C. A., §270 (printed as Appendix B to Respondent's Brief, pp. 40-42).

Thus, as the Circuit Court said herein:

> "* * * the only limitation placed upon admission to the class of persons who may recover on the contractor's bond in the Act itself is that they must have 'furnished labor or material in the prosecution of the work'. Surely plaintiff's credentials as presented in its complaint entitle it to the protection of the Act within a literal reading of the statute" (R. 24).

Immediately following the provision quoted above from the second section (§270b), there is a proviso as follows: "*Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons."

Petitioners asked the Circuit Court of Appeals to find that this proviso in effect amended the other sections of

the Act, including the second section, in which the proviso appears, so as to limit recovery on the bond to persons furnishing labor or material directly to the contractor or a subcontractor (defined technically as one under contract to perform work at the site).

Nowhere in the Act is there any provision that only those persons who have furnished labor or material directly to the contractor or subcontractor may recover. The word "subcontractor", in fact, is not found elsewhere in the Act. The language of the Act throughout indicates plainly that the test of the right to recover on the contractor's bond is whether claimant has furnished labor or material in the prosecution of the public work.

The proviso does not state, as petitioners argue, that only those persons may recover who have furnished labor or material directly to a contractor or a subcontractor. The proviso merely states that persons furnishing labor or material through a subcontractor are required to give notice to the contractor within a limited period before commencing suit on the bond. Respondent has given such notice (R. 6).

The language of the proviso itself indicates that there was no intention to limit recovery to persons furnishing labor or material to a contractor or subcontractor. The proviso states that the claimant, in giving notice, must set forth "the amount claimed and the name of the *party* to whom the material was furnished or supplied or for whom the labor was done or performed." (Italics supplied.) If it had been the intent to limit recovery by the proviso to claimants furnishing material to the contractor or a subcontractor, the proviso would have required that in the notice to be given to the contractor, the name of the *subcontractor*, not the name of the *party* to whom the material was furnished, be stated.

As the Circuit Court said herein:

> "* * * obviously, this provision is not an *exception*, which exempts absolutely from the operation of a statute. The provision is essentially an *explanation*—to make clear (what was not clear under the prior Heard Act) that the absence of direct contractual relationship with the general contractor should not defeat actions on the payment bond. Thus, the underlying idea of the provision was to extend (rather than to restrict) the ambit of the Miller Act" (R. 28).

This Court, in construing the proviso, has stated that it is a "condition precedent to the right to sue", and not that it is a limitation on the persons protected by the Act, as petitioners contend it is (Brief, pp. 6, *et seq.*).

> *Fleisher Engineering & Construction Co.* v. *U. S. for Use of Hallenbeck*, 311 U. S. 15, 18, 85 L. ed. 12, 15 (1940).

Petitioners, however, after amending the proviso so as to provide that only those persons furnishing labor or material directly to a contractor or subcontractor may recover on the bond, contend that the proviso as thus amended is not "inconsistent" with the broader terms which precede it", *i. e.*, the sections of the Act which provide that *all* persons furnishing labor or material in the prosecution of the public work may recover on the bond without qualification or restriction (Brief, p. 10).

Petitioners, having argued that the proviso amends the plain provisions of the Act, go on to argue that respondent cannot recover, although it supplied material under a contract with the Miller Company (which in turn had a contract with MacEvoy), because the Miller Com-

pany was not a subcontractor in the narrow, technical sense in which petitioners insist the term must be understood. Petitioners define a subcontractor as a person who performs, at the site, part of the work called for by the contract (Brief, p. 27).

Having in mind the purpose of the Act as expressed in its title and the broad provisions of the body of the Act, as well as the language of the proviso itself, it cannot be said that Congress used the word "subcontractor", as petitioners argue, in the narrow, technical sense of a person who performs, at the site, part of the work called for by the contract.

The Circuit Court concluded that:

> "* * * every effort should be made by us to give to the word 'subcontractor', in this setting, a broad, general (rather than its narrow, technical) denotation" (R. 28).

The word "subcontractor" has been widely used in the sense of one who has a contract for labor or material with the contractor.

This Court in a case construing the Heard Act used the word "subcontractor" several times in its opinion in referring to a materialman which had a contract with the contractor to supply bricks.

> *United States Fidelity & Guaranty Company* v. *United States for the use and benefit of Golden Pressed & Fire Brick Company*, 191 U. S. 416, 417, 425, 426, 48 L. ed. 242, 246, 247 (1903).

In the present case, the Miller Company which had a contract with the contractor to supply wallboard is in exactly the same situation as the brick company in the

case just referred to and would, therefore, be considered a subcontractor.

The United States Court of Appeals for the Indian Territory in *Campbell & Williams* v. *William Cameron & Co.*, 5 Ind. Ter. 323 (1904), held that a materialman who furnishes lumber to a contractor is a subcontractor.

In *Western Sash & Door Co.* v. *Buckner*, 80 Mo. App. 95 (1899), the Court defined the word "contractor" to include one who furnishes material only and the word "subcontractor" to include one who furnishes material under a contract with the contractor. The Court said:

> "One who furnishes materials to an original contractor under a contract with him, under the statute is as much a subcontractor as if he furnished labor alone, or both labor and materials. The practical construction given the statute by the Appellate Courts of this state in a great number of cases has been to the effect that whether one furnishes material or labor, or both, under a contract with the original contractor, he has been alike regarded as a subcontractor entitled to a lien" (p. 100).

In *Mobley* v. *Leeper Bros. Lumber Co.*, 89 Oklahoma 95 (1923), the plaintiff lumber company contracted with the contractor to furnish lumber. The Supreme Court of Oklahoma held that the lumber company became a subcontractor or submaterialman, quoting *Ryndak* v. *Seawell*, 13 Oklahoma 737 (1904), wherein the Supreme Court had said:

> "We think that when a materialman enters into a contract with a contractor to furnish material for a building which the contractor has agreed to build, and when the materialman has knowledge of

> such contract, and makes his contract in relation thereto, with the understanding that the material is to be used by the contractor in the building, he thereby becomes a subcontractor, within the meaning of the mechanic's lien law * * *."

In *City of Salem* v. *The Lane & Bodley Co.*, 189 Ill. 593, 599 (1901), the Illinois Supreme Court held that the plaintiff who had delivered an engine to the city for use in a building was a contractor within the meaning of the Lien Law.

In *Edinger Co.* v. *Hildreth Mem. U. E. Church*, 199 Iowa 1117, 1120 (1925), the plaintiff who had contracted to furnish stone to the contractor was held to be a subcontractor. The Iowa Supreme Court held that the word "subcontractor" under the mechanics' lien statute of Iowa included a materialman.

In *Anthony* v. *Dukes*, 130 Okla. 298 (1928), *Josey Oil Co.* v. *Ledden*, 162 Okla. 262 (1933) and *Standard Accident Insurance Co.* v. *Deep Rock Oil Corporation*, 180 Okla. 260 (1937), the Supreme Court of Oklahoma held that one who furnished material to a contractor was a subcontractor.

In *South Side Lumber Co.* v. *Date*, 156 Ill. App. 430, 438 (1910), certiorari denied by the Supreme Court of Illinois, a materialman furnishing material to a contractor was held to be a subcontractor.

In *Neary* v. *Puget Sound Engineering Co.*, 114 Wash. 1, 194 P. 830, a case on which petitioners rely, the Washington State Court recognized that there is no uniform rule with respect to the meaning of the word "subcontractor" and that in other jurisdictions the word has been construed to include persons who furnish material alone. The Supreme Court of Washington said:

> "In other jurisdictions, there may be other rules, but under the rule established in this State, Harmon was a materialman" (p. 8).

For every State Court case which petitioners may cite holding that one who contracts with the contractor to furnish material alone is not a subcontractor, respondent is able to cite a case holding that such a person is a subcontractor. Both the District Court and the Circuit Court decided that it would be futile to attempt to reconcile the hopelessly conflicting State Court decisions on this subject. As the Circuit Court said herein:

> "Nor do we feel it necessary to indulge in lingual gymnastics by losing ourselves in the labyrinth of divergent decisions which attempt to make a distinction (either practical or theoretical) between a 'subcontractor' and a 'materialman'. We cordially agree with the court below in that an effort to do so would only leave 'the searcher after truth in a state of unhappy confusion'. Cf. *McNab & Harlin Mfg. Co.* v. *Paterson Building Co.*, 72 N. J. Eq. 929, 67 Atl. 103 (1907), with *Northwest Roads Co., et al.* v. *Clyde Equipment Co.*, 79 F. (2d) 771 (C. C. A. 9th, 1935).
>
> • • • Inasmuch as there is no uniform rule on the subject, we are satisfied that Congress used the word 'subcontractor' in its broad, generic sense so as to include persons who have a contract to furnish building materials to a materialman. By so doing, instead of torturing the meaning of the disputed provision in section two of the Miller Act, we attempt to bring it into harmony with both the Congressional intent and the express wording of the remainder of the statute. Cf. *United States to the Use of Alexander Bryant Co.* v. *New York Steam Fitting Co.*, 235 U. S. 327 (1914); *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429 (C. C. A. 3d, 1914)" (R. 29).

Petitioners themselves in their own brief show that Congress must have intended to use the word "subcon-

tractor" in its generic sense in the proviso of Section 2(a) of the Miller Act (which is the only place in the Act where the word is used). The Senate and House Judiciary Committee reports, according to an extract quoted at page 22 of petitioners' brief, state that "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes". A sub-subcontractor would be a subcontractor under a subcontractor. If the word "subcontractor" does not include persons who contract to furnish material alone, then a person who furnishes material to a subcontractor would not be a sub-subcontractor and could not recover on the bond, according to petitioners. But petitioners insisted in their brief to the Circuit Court of Appeals that a person who supplies material to a subcontractor can recover on the bond. Petitioners said:

> "It is only fair and reasonable that protection should be afforded to a materialman who furnishes materials to such a subcontractor * * *" (p. 14).

And in their brief here they rely on a statement by Representative Miller to the effect that materialmen who deal with subcontractors on public works can recover on the bond (p. 21).

Since petitioners claim that only a subcontractor or a sub-subcontractor may recover and at the same time claim that a person who furnishes material to a subcontractor may recover, it follows that petitioners consider a person who furnishes material to a subcontractor to be a sub-subcontractor, *i. e.*, a subcontractor under a subcontractor. And if petitioners consider one who furnishes material to a subcontractor to be himself a subcontractor, petitioners cannot consistently claim that one who furnishes material to a contractor is not also a subcontractor.

Petitioner Surety in this action admitted in its petition for a writ of certiorari in *Utah Construction Company* v. *United States*, 273 U. S. 745, 71 L. ed. 870 (1926) (in which case petitioner Surety herein was one of the defendants) that a contract to furnish material is "sometimes called a subcontract" (p. 7).

Thus, this Court, various State Courts, and even petitioners themselves have used the term "subcontractor" in its broad, generic sense to include persons having a contract to furnish material; and in that sense the Miller Company, which had a contract with the contractor to furnish material, was a subcontractor and respondent, which (as the District Court states) (R. 14) had a contract with the Miller Company to furnish material, was a sub-subcontractor, *i. e.*, a subcontractor under a subcontractor.

Respondent asks the Court to give to the word "subcontractor" as used in the proviso in Section 2(a) of the Miller Act the broad, generic meaning which this Court and Congress have given it. By so doing, the proviso will be brought into harmony with the purpose of the Act as expressed in its title and in its main provisions which state, without qualification, that all persons furnishing labor or material in the prosecution of the work may recover on the contractor's bond.

Petitioners, on the other hand, ask the Court to rephrase the proviso so that instead of providing, as it now does, that certain persons must give notice before suing, it shall provide that only those persons who have dealt with the contractor or a subcontractor may recover; and after thus rephrasing the proviso, petitioners ask the Court to make it still more restrictive of the persons who may recover by defining "subcontractor" narrowly and technically as a person who performs part of the contract at the site of the work. Petitioners' construction requires an amendment of the language of the proviso as

well as the rejection of the broad, generic meaning given the term "subcontractor" by this Court and various State Courts in connection with public works statutes. The result of this construction would be to bring the proviso into direct conflict with the title and the main provisions of the Act.

The Circuit Court of Appeals for the Third Circuit, construing the Heard Act, in *Vermont Marble Co.* v. *National Surety Co.*, 213 F. 429 (1914), has held that it would not construe a subsidiary provision of the Act so as to bring it in conflict with the general purpose and main provisions of the Act.

That Court said:

> "It is consistent with our respect for the legislative department, that we should not impute an intent to do indirectly what might better and more easily have been done directly, or by inconsistent provisions in the same statute, to accomplish a result by implication which contradicts the plainly expressed purpose of the act" (p. 434).

and further that;

> "The general purpose of the act thus clearly recognized, is not to be obstructed or deprived of its efficacy by a subsidiary provision in the same act, which, though presumably intended to increase and not diminish the protection given to the class of persons described, nevertheless, if construed as mandatory and jurisdictional, and not merely directory, seriously impairs the right conferred upon that class, and deprives persons furnishing materials and labor for the construction of public works, of the full measure of protection previously accorded them in the body of the act.

> It is to be observed that this provision as to publication of notice, is not an exception out of the general right accorded the persons for whose benefit the act was passed, but is a subsidiary provision, evidently meant to be consistent with the general intent of the act, and only by implication inconsistent therewith" (p. 434).

This Court approved the foregoing statement of the Circuit Court of Appeals in the following language in *United States of America for the Use and Benefit of Alexander Bryant Company* v. *New York Steam Fitting Company*, 235 U. S. 327, 59 L. ed. 253 (1914):

> "In *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429, the circuit court of appeals for the third circuit had occasion to pass upon the act of Congress under consideration. The court, Circuit Judge Gray speaking for it, decided against the contention now made by the Surety Company. The careful review and exposition of the statute there made leave little else to be said" (pp. 339, 258).

And this Court, speaking of conflicting and ambiguous provisions of the Heard Act, said:

> "In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfil its whole purpose."
>
> *Fleischmann Construction Company* v. *United States to the Use of Forsberg*, 270 U. S. 349, 360, 70 L. ed. 624, 631 (1926).

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be

avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. See *Hawaii* v. *Mankichi*, 190 U. S. 197, 212, 47 L. ed. 1016, 1020, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465, and cases there cited. In ascertaining that purpose, we may examine the title of the act (*United States* v. *Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *United States* v. *Palmer*, 3 Wheat. 610, 631, 4 L. ed. 471, 477; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 462, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 516), the source in previous legislation of the particular provision in question (*United States* v. *Saunders*, 22 Wall. 492, 22 L. ed. 736; *Viterbo* v. *Friedlander*, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962; *United States* v. *Morrow*, 266 U. S. 531, 535, 69 L. ed. 425, 427, 45 Sup. Ct. Rep. 173), and the legislative scheme or plan by which the general purpose of the act is to be carried out. See *Platt* v. *Union P. R. Co.*, 99 U. S. 48, 63, 64, 25 L. ed. 424, 429; *Bernier* v. *Bernier*, 147 U. S. 242, 246, 37 L. ed. 152, 154, 13 Sup. Ct. Rep. 244."

United States of America v. *Katz*, 271 U. S. 354, 357, 70 L. ed. 986, 988 (1926).

POINT II.

The bond given by petitioners on which this action was brought states clearly that it is for the protection of all persons supplying labor or material in the prosecution of the work.

The condition of petitioners' bond on which this action was brought is that defendant as "principal shall promptly make payment to all persons supplying labor and material

in the prosecution of the work provided for in said contract" (R. 17).

As the Circuit Court said herein:

> "* * * the only restriction or qualification in the bond itself, as in the Act, is that the person seeking a recovery must have supplied labor or material for the project" (R. 25).

The proviso in the second section (§270b) of the Miller Act as construed by petitioners would limit the persons who may recover on the bond to those having a direct contractual relationship with the contractor or a subcontractor, in the narrow, technical sense in which petitioners use that term, and would, therefore, be in conflict with the plain provisions of petitioners' bond.

POINT III.

The Circuit Court's construction of the Miller Act in this action follows the decisions of this Court construing the Miller Act and the earlier Heard Act which the Miller Act repealed.

The decisions of this Court construing the Heard Act hold that all persons, without qualification or restriction, furnishing labor or material in the prosecution of the public work may recover on the contractor's bond.

In *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906), this Court, construing the Heard Act, said:

> "There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor but all persons supplying

> the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed" (pp. 204; 441).

And earlier in its opinion in the same case, this Court said that in the construction of the obligation of the bond,

> "we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end" (pp. 203; 440).

In *Illinois Surety Company* v. *John Davis Company*, 244 U. S. 376, 61 L. ed. 1206 (1917), this Court likewise stated that "the purpose of the act was to provide security for the payment of all persons who provide labor or material or public work" and that "the basis of recovery is supplying labor and material for the work" (pp. 380; 1211).

In *Fleischmann Construction Company* v. *United States of America to the Use of Forsberg*, 270 U. S. 349, 70 L. ed. 624 (1926), *supra*, this Court, again construing the Heard Act, said:

> "The purpose of the Materialmen's Act, which is highly remedial and must be construed liberally, is to provide security for the payment of all persons who supply labor or material in a public work, that is, to give all creditors a remedy on the bond of the contractor, to be enforced within a reasonable time in a single proceeding in which all claimants shall unite. *United States, ex rel., Alexander Bryant Co.*

> v. *New York Steam Fitting Co.*, 235 U. S. 327, 337, 59 L. ed. 253, 257, 35 Sup. Ct. Rep. 108; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211, 37 Sup. Ct. Rep. 614. In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfill its whole purpose" (pp. 360; 631).

The Heard Act expressly provided that the contractor's bond shall obligate the contractor or contractors to "promptly make payments to all persons supplying *him* or *them* with labor and materials in the prosecution of the work * * *." (Appendix B, p. 40; italics supplied.)

Under a strict interpretation of this language, a person could not recover under the Heard Act if he supplied labor or material to a subcontractor. He could recover only if he supplied labor or material to a contractor.

In fact, in some of the earlier decisions construing the Heard Act, Courts took that very position: that only those persons furnishing labor and material to the contractor could recover on the bond, and that persons dealing with a subcontractor (however defined) were not protected under a strict construction of the language of the Act.

> "Neither the Hurd Act nor the bond here given pursuant to its provisions expressly covers labor or materials furnished to a subcontractor or to any one other than the principal contractor. It was at first held under the act that the terms of the bond could not be enlarged by implication, and that one who furnished labor or material to a subcontractor had no right of action on the contractor's bond. *United States* v. *Simon* (C. C. A.) 98 F. 73; *United States* v. *Farley* (C. C.) 91 F. 474;

Mosier v. *Kurchhoff*, 51 Misc. 432, 101 N. Y. S. 643; see *United States to Use of Vermont Marble Co.* v. *Burgdorf*, 13 App. D. C. 506, at page 520. But it has been established since 1906 that, since the statute should be liberally construed with an eye to its purpose of protecting all who furnish labor or material for use in the construction or repair of government buildings and works, such persons are protected by the bond even though the labor and materials are supplied to a subcontractor, and although the bond expressly covers only labor and material furnished to the contractor. *United States to Use of Hill* v. *America Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 L. Ed. 437; *Mankin* v. *U. S. to Use of Ludowici-Celadon Co.*, 215 U. S. 533, 30 S. Ct. 174, 54 L. Ed. 315; *Utah Construction Co.* v. *United States* (C. C. A.) 15 F. (2d) 21; *Taylor* v. *Connett* (C. C. A.) 277 F. 945; *Smith* v. *Mosier* (C. C.) 169 F. 430; *Bartlett & Kling* v. *Dings* (C. C. A.) 249 F. 322; *cf. Pavarini & Wyne* v. *Title Guaranty & S. Co.*, 36 App. D. C. 348, Ann. Cas. 1912C, 367."

United States to Use of Galliher & Huguely, Inc., et al. v. *James Baird Co., et al.*, App. D. C., 73 F. 2d 652, 654 (1934).

In *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906) *supra*, and other cases decided by this Court, the claimant did not deal with the contractor. And yet, despite the language in the Heard Act that persons supplying the contractor might recover on the bond, this Court permitted persons supplying subcontractors to recover for the reason that they furnished labor or material in the prosecution of the work.

If this Court in the *Hill* case had followed the reasoning of petitioners in this case, this Court might have said: "The Heard Act provides that only persons dealing with the contractor may recover; this claimant did not deal with the contractor, therefore, this claimant cannot recover." This Court, however, held that the language of the Heard Act did not limit the right of recovery to those who furnished material or labor directly to the contractor but held that "the manifest purpose of the statute (is) to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end".

> *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203, 50 L. ed. 437, 440 (1906), *supra*.

This Court construing the Heard Act has held that in no instance has this Court refused to allow any person to recover on the contractor's bond, who has actually furnished material for the performance of the public work where suit was brought within the prescribed period.

In *Illinois Surety Company* v. *John Davis Company*, *supra*, 244 U. S. 376, 61 L. ed. 1206 (1917), *supra*, this Court, construing the Heard Act, said:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act" (pp. 380; 1211).

In *Utah Construction Company* v. *United States*, 9 Cir., 15 F. 2d 21 (1926), certiorari denied, 273 U. S. 745,

71 L. ed. 870, the United States entered into a contract with the Utah Construction Company as contractor for the construction of a weir. The contractor entered into a contract with Wattis-Samuels Company to furnish all material necessary to do certain concrete work. Wattis-Samuels Company made a contract with one Paul under which Paul agreed to sell and deliver the sand and gravel required. Paul hired three different concerns—Lindstrom, Daniel Contracting Company and Henry C. Peterson, Inc. —to furnish their several tugboats and lighters for the transportation of the sand and gravel to the site of the project.

Lindstrom and the Daniel and Peterson companies were not paid and sued to recover on the contractor's bond, the action being brought in the name of the United States to the Use of Lindstrom, with the Daniel and Peterson companies as interveners.

The defendant Aetna Casualty and Surety Company, the surety in that case as in the present case, and its principal, the contractor, contended that Lindstrom and the Daniel and Peterson companies could not recover on the contractor's bond under the Heard Act because they were not persons supplying materials to the contractor or even to a subcontractor. The defendants contended that Paul, who hired Lindstrom to tow the lighters of the Daniel and Peterson companies for the transportation of the sand and gravel, was not a subcontractor but at best a materialman who sold materials to Wattis-Samuels Company, which had contracted with the contractor to furnish them. In other words, the defendants contended that Lindstrom and the Daniel and Peterson companies could not recover because they had been employed by a materialman and not by a contractor or subcontractor.

The Circuit Court was thus called upon to decide whether under the Heard Act persons who were employed by a materialman who furnished material to another per-

son who finally furnished them to the contractor could recover on the contractor's bond.

The Court held that such persons were protected under the Heard Act and allowed Lindstrom and the Daniel and Peterson companies to recover on the bond. The Court said:

> "The argument that Paul was only a vendor of material to a subcontractor and that those whom he employed (Lindstrom and the Daniel and Peterson companies) cannot avail themselves of the protection of the bond, is too restrictive of the language of the statute" (p. 24).

The Court held that Lindstrom and the Daniel and Peterson Companies could recover whether Paul, by whom they were employed, was called a materialman or a subcontractor. The Court said:

> "But as he (Paul) did supply material and labor which were used, whether he be called a materialman or a subcontractor supplying labor is not of vital importance, for the statute is broad enough to afford protection to him and the relator (Lindstrom)" (p. 24).

The Court thus held that under the Heard Act any person furnishing labor or material in the prosecution of the work could recover on the contractor's bond, whether the person to whom they were furnished was a subcontractor or materialman.

Petitioners admit that "That case (*Utah Construction Co.* v. *United States*) purportedly stands for the proposition that, under the Heard Act, a vendor to a materialman is protected" (Brief, p. 19).

In fact, the Circuit Court in that case held that employees of a materialman who furnished material to another

person who finally furnished them to the contractor, could recover on the contractor's bond.

The defendants, in *Utah Construction Company* v. *United States, supra,* applied to this Court for a writ of certiorari, repeating the arguments advanced by them in the Circuit Court of Appeals. In their brief to this Court in support thereof, the defendants stated "that the liability under the bond extended only to those who had supplied it (the contractor) or its subcontractor, with labor or material and not to those who supplied labor or materials to a materialman" (p. 15). In their petition they argued that the Heard Act was not intended to inure to the benefit of such persons as Lindstrom and the Daniel and Peterson Companies but only "to those supplying the contractor (directly or through one to whom he has let the work), with labor and material" (p. 5).

Petitioners in their brief in that case (pp. 26-27) predicted that the Circuit Court's decision would result in dire consequences as follows:

> "If the view of the Circuit Court of Appeals (in the *Utah Construction Company* case) is correct, it must necessarily follow that a contractor could not, in safety, so much as purchase a keg of nails and pay for it without first satisfying himself at his own risk that the drayman who hauled it to the job of the vendor had been paid for his services, and that the wholesaler from whom the vendor purchased it had likewise been paid."

This Court denied the petition for a writ of certiorari.

> *Utah Construction Co.* v. *United States*, 273 U. S. 745, 71 L. ed. 870 (1927).

The decisions of this Court construing the Heard Act and the Miller Act have held that under the Heard Act

the basis of recovery on the contractor's bond is supplying labor and material for the work; that "in every case which has come before this Court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act" (*Illinois Surety Company* v. *John Davis Company, supra*); and that the Miller Act enlarges the protection given under the Heard Act and, like it, is highly remedial and to be liberally construed.

Petitioners state that "the decisions in the state courts (construing state public works statutes) have advanced several reasons for denying relief to vendors of materialmen under public work statutes" (Brief, p. 39). Not one of the cases cited by petitioners involved a statute essentially the same as the Miller Act. Two of these cases—*Ewen* v. *Thompson-Starrett Company*, 208 N. Y. 245 and *Bohnen* v. *Metz*, 126 App. Div. 807, aff'd 193 N. Y. 676—involved a section of the New York State Labor Law; another—*Huddleston* v. *Nislar*, 72 S. W. (2d) 959 (Texas)— involved a Texas Lien Law. In this connection, the Court will note that the New York Court of Appeals in a fragment from its opinion quoted by petitioners (Brief, p. 15) was not referring by the word "Act" to the Miller Act or the Heard Act, but to a section of the New York Labor Law.

Of the cases cited by petitioners involving public works statutes (including *Neary, et al.* v. *Puget Sound Engineering Co., et al.*, 114 Wash. 1, 194 Pac. 830, *supra*, construing the Washington public works statute, on which the District Court relied), not one contains the plain language of the Miller Act that all persons furnishing labor or material in the prosecution of the public work may recover.

For every case which petitioners have cited holding that a materialman who supplies a materialman cannot

recover under a public works bond given pursuant to a state statute, respondent is able to cite a case holding that such a person can recover.

City of Portland v. *New England Casualty Co.*, 78 Oregon 195, 152 P. 253 (1915);
American Guaranty Co. v. *Cincinnati Iron & Steel Co.*, 115 Ohio State 626, 155 N. E. 389 (1927);
French v. *Powell*, 135 Cal. 636, 68 P. 92 (1902);
Gilmore v. *Westerman*, 13 Wash. 390, 43 P. 345 (1896);
People v. *U. S. Fidelity & Guaranty Co.*, 263 Mich. 638 (1933);
Cf. Williamson v. *Williams*, 262 Mich. 401, 247 N. W. 704 (1933).

As the Circuit Court herein said of cases involving public works statutes:

> "The Court below relied heavily on a number of decisions construing state public work statutes. These authorities, of course, are not binding on us in the interpretation of federal legislation, and at best they are deceptive since the purpose, scope and terms of the state enactments are so varied and so different from the act under consideration" (R. 28-29).

POINT IV.

This Court's liberal construction of the Heard Act has not resulted in, and the Circuit Court's similar construction of the Miller Act will not result in, the consequences feared by petitioners.

In 1935, when Congress passed the Miller Act repealing the Heard Act, Congress knew that this Court, in construing the Heard Act, as far back as 1906 had said that: "we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end" (*United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203; 50 L. ed. 437, 440, *supra*). Congress knew that this Court, in construing the Heard Act in 1917, had held that "the purpose of the act was to provide security for the payment of all persons who provide labor or material on public work" and that "the basis of recovery is supplying labor and material for the work" (*Illinois Surety Company* v. *John Davis Company*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211, *supra*).

Congress also knew that the Circuit Court of Appeals for the Ninth Circuit, in construing the Heard Act in 1926, had held that the Act was broad enough to protect a claimant who had supplied material to the vendor of material to a contractor and that this Court had denied certionari in that case (*Utah Construction Company* v. *United States*, 15 F. 2d 21, cert. denied, 273 U. S. 745, 71 L. ed. 870, *supra*).

If the Heard Act as construed by this Court and the Circuit Court of Appeals had been "impracticable" and "unworkable" and had resulted in increased costs to the Government as well as the contractor, and in "hardship,

injustice and absurdity, not only from the viewpoint of the contractor but also of the Government" (Petitioners' Brief, p. 17), these results would have become apparent to Congress during the twenty-nine years that had elapsed between 1906, when this Court decided *United States for the Use of Hill* v. *American Surety Company, supra* and 1935, when Congress passed the Miller Act. And it is inconceivable that, if any such results had followed this Court's liberal construction of the Heard Act, Congress would have substituted for the Heard Act the Miller Act which this Court has held was intended to enlarge the protection given laborers and materialmen under the Heard Act.

> *United States to the Use of Noland Company, Inc.* v. *Irwin*, 316 U. S. 23, 29, 86 L. ed. 1241, 1245 (1942).

With the experience of almost thirty years under this Court's liberal construction of the Heard Act, Congress enacted the Miller Act, giving even more liberal protection to laborers and materialmen than did the Heard Act: where the Heard Act provided that persons furnishing labor or materials in the prosecution of public work to the *contractor* might recover, the Miller Act provides that all persons furnishing labor or material in the prosecution of public work may recover on the contractor's bond.

At the time Congress was considering a new act to repeal and supersede the Heard Act, Congress had before it various bills on the general subject of bonds for the protection of laborers and materialmen. It was to this assortment of bills, and not to the meaning of any particular bill, that the statement of Representative Miller quoted in petitioners' brief, page 20, referred. Two of these bills, H. R. 2068 and H. R. 6677, contained a proviso of the kind which the Circuit Court in this case defines as "an

exception, which exempts absolutely from the operation of a statute" (R. 28). The proviso was negative in form and expressly *denied* the right of recovery to certain persons. The Committee of the House in charge of the bills rejected H. R. 2068, and H. R. 6677 and reported out H. R. 8519 (which became the Miller Act) in which the proviso in the second section is, in the words of the Circuit Court in this case, "essentially an *explanation*—to make clear (what was not clear under the prior Heard Act) that the absence of direct contractual relationship with the general contractor should not defeat actions on the payment bond. * * * The provision came not to destroy but to fulfill; to give more abundant life to the broad sweep of an admittedly beneficent remedial statute" (R. 28).

Senator Burke summed up the intent of Congress in passing the Act in the following statement:

> "Mr. President, this bill proposes to amend what is known as the 'Heard Law'. * * * This bill would amend that law by requiring an additional bond, a payment bond, for the protection of material men and laborers, subcontractors, and all who put forth their labor or furnish materials or incur expenditures in connection with the work."
>
> Vol. 79 Congressional Record, Part 12, page 13382, Senate proceedings, 74th Congress, 1st Session (H. R. 8519).

As this Court and other courts have pointed out, it is a simple matter for the contractor himself to guard against such consequences as petitioners state they fear.

In *United States for the Use of Hill* v. *American Surety Company* (1906), *supra*, this Court said:

> "We cannot conceive that this construction works any hardship to the surety. The contractor gets the

> benefit of such work or material. It is distinctly averred in this case that the original contractor received the benefit of the work done, and it was used in part performance of his contract. It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure'' (pp. 204; 441).

To the same effect is the later decision of this Court in *Mankin* v. *United States to the Use of Ludowici-Celadon Co.*, 215 U. S. 533, 540, 54 L. ed. 315, 318 (1910), *supra*.

In *City of Portland* v. *New England Casualty Co.*, 78 Oregon 195, 152 P. 253 (1915), *supra*, a truckman engaged by a sub-subcontractor with whom neither the contractor nor the first contractor had dealt was permitted to recover on the contractor's bond. The defendants in that case advanced substantially the same argument as to consequences as is now advanced by petitioners. The Supreme Court of Oregon said:

> "In order to free himself from liability on the bond for material or labor furnished, the act, in effect, imposes upon a contractor the duty of seeing that the persons who furnish the material and perform the labor in the furtherance of the contract are paid. This would not seem to work any hardship upon the contractor or his surety, for, if he does not care to ascertain who actually supplies the labor and materials, he can require that the subcontractor indemnify him with proper security'' (p. 201).

A contractor can also protect himself against the consequences feared by petitioners by exercising care in

selecting the persons with whom he deals, by requiring from such persons, before paying them, affidavits that all labor and material furnished by or through them have been paid for, and by withholding all or part of the payment due such persons until the 90 days in which notice of claims must be given to the contractor under the Miller Act have elapsed.

If the contractor fails to protect himself and contracts with financially irresponsible persons, he may not defeat recovery by a claimant on the contractor's bond on the ground that he has already paid such persons. This Court, in *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211 (1917), *supra*, has said:

> "As the basis of recovery is supplying labor and material for the work, he who has supplied them to a subcontractor may claim under the bond, even if the subcontractor has been fully paid. *Mankin* v. *United States*, 215 U. S. 535, 54 L. ed. 315, 30 Sup. Ct. Rep. 174."

In *Mankin* v. *United States for the Use of Ludowici-Celadon Co.*, 215 U. S. 533, 54 L. ed. 315 (1910), *supra*, the use plaintiffs were permitted to recover an amount in excess of the balance owing from the contractor to the subcontractor.

In *Seaboard Surety Company* v. *Standard Accident Insurance Company*, 277 N. Y. 429 (1938), the New York Court of Appeals said:

> "The Hurd (Heard) Act requires any person contracting to do public work for the United States to execute a bond not only for completion but also conditioned on prompt payment of all persons supplying labor and materials in the prosecution of the work. It has been held that a materialman

may recover on the bond of the general contractor, even though he supplied material to the subcontractor and even though the subcontractor has already been paid in full. (*Hill* v. *American Surety Co.*, 200 U. S. 197; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533. See *Illinois Surety Co.* v. *Davis Co.*, 244 U. S. 376, 380.)" (p. 433).

CONCLUSION.

The order of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

BENJAMIN P. DEWITT,
Counsel for Respondent.

SIDNEY PEPPER,
Of Counsel.

APPENDIX A.

The Miller Act.

An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to Be Accompanied by a Performance Bond Protecting the United States and by an Additional Bond for the Protection of Persons Furnishing Material and Labor for the Construction, Alteration, or Repair of Said Public Building or Public Work.

49 Stat. at L. 793, Act Aug. 24, 1935, c. 642, §1, 40 USCA §270a. **Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such persons shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. When-

ever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §2, 40 USCA §270b. **Same; rights of persons furnishing labor or material.**

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum

or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

40 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §3, 40 USCA §270c. **Same; right of person furnishing labor or material to copy of bond.**

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application

therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §4, 40 USCA §270d. **Same; definition of "person" in sections 270a, 270b and 270c.**

Sec. 4. The term "person" and the masculine pronoun as used in sections 270a, 270b and 270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

Sec. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C. title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

APPENDIX B.

The Heard Act.

(Repealed by the Miller Act, §5.)

40 USCA §270 (Aug. 13, 1894, c. 280, 28 Stat. at L. 278; Feb. 24, 1905, c. 778, 33 Stat. at L. 811; Mar. 3, 1911, c. 231, §291, 36 Stat. at L. 1167). **Bonds of contractors for public buildings or works; right of persons furnishing labor and materials.**

Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said interveners. If no suit should be brought by

the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties'

liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

INDEX

CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 483

CLIFFORD F. MACEVOY COMPANY AND THE AETNA CASUALTY AND SURETY COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF THE CALVIN TOMKINS COMPANY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On December 13, 1943, the Court entered an order granting certiorari in this case and inviting the Solicitor General to file a brief *amicus curiae*. This brief is filed pursuant thereto.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 8–14) is reported in 49 F. Supp. 81. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 21–29) is reported in 137 F. (2d) 565.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 13, 1943 (R. 30). A petition for rehearing was denied on September 20, 1943 (R. 43). The petition for a writ of certiorari was filed on November 9, 1943, and granted on December 13, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the Miller Act a Government contractor and his surety are liable under a payment bond to the vendor of his materialman for materials furnished in the prosecution of the work, for which the vendor has not been paid in full.

STATUTES INVOLVED

The pertinent provisions of the Miller Act (Act of August 24, 1935, c. 642, 49 Stat. 793; 40 U. S. C. 270a *et seq.*) and of the Heard Act (Act of August 13, 1894, c. 280, 28 Stat. 278) as amended (Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. 270) are printed in the Appendix, *infra*, pp. 17–23.

STATEMENT

The allegations of the complaint filed by respondent in the district court and admitted by petitioners' motion to dismiss are as follows:

On June 3, 1941, petitioner Clifford F. MacEvoy Company entered into a contract with the

United States whereby MacEvoy agreed to furnish the materials and perform the work necessary for the construction of seven hundred dwelling-units on the site of the Government's Defense Housing Project near Linden, New Jersey, on a cost-plus-fixed-fee basis (R. 3–4). Pursuant to the Miller Act (Appendix, *infra*, pp. 17–21), MacEvoy as principal and petitioner Aetna Casualty and Surety Company as surety, executed a bond in the amount of one million dollars, conditioned on the prompt payment by MacEvoy "to all persons supplying labor and material in the prosecution of the work provided for in said contract" (R. 4, 16–17). The bond was duly accepted by the United States (R. 4).

MacEvoy thereafter entered into a contract with James H. Miller & Company whereby the latter agreed to furnish certain building materials for use in the prosecution of the work provided for in MacEvoy's contract (R. 5). Thereafter the respondent, Calvin Tomkins Company, pursuant to an agreement with Miller (R. 11) and with the knowledge and approval of MacEvoy, furnished building materials worth $47,119.14 to Miller for use in the construction of the project (R. 5–6). Miller paid Tomkins only $35,085.65, leaving an unpaid balance of $12,033.49.

Within ninety days from the date on which Tomkins furnished the last of the materials to Miller, Tomkins gave written notice to MacEvoy and the surety of the existence and amount of

Tomkins' claim for materials furnished to Miller. Thereafter, within one year after final settlement of MacEvoy's contract with the United States, Tomkins as use-plaintiff instituted the present action against MacEvoy and the surety on the payment bond (R. 6).

Petitioners moved to dismiss the complaint for failure to state a claim against them (R. 7), and apparently submitted an affidavit stating that MacEvoy had paid Miller in full for all materials and supplies the latter had furnished for the construction of the instant project (R. 18–19). The district court granted the motion to dismiss (R. 15), but the Circuit Court of Appeals reversed that decision (R. 30), and subsequently denied MacEvoy's petition for rehearing (R. 43).

SUMMARY OF ARGUMENT

The proviso in Section 2 (a) of the Miller Act indicates that Congress intended to protect only those who contracted directly with either the prime contractor or his subcontractors, but not to protect more remote claimants. Respondent is, however, within the protected class.

Under the Heard Act, predecessor to the Miller Act, materialmen such as respondent were protected. The Miller Act was intended merely to remove procedural difficulties which hampered claimants under the Heard Act, and not to narrow the scope of the protected class. The purpose of the legislation does not justify the distinction

petitioners seek to draw, because those supplying labor and materials are admittedly protected if their vendee performs labor for the prime contractor in addition to supplying him with materials. No purpose can be seen or has been suggested which would be served by denying recovery to persons identically situated because of the irrelevant circumstance that their vendee does not perform labor for the prime contractor as well as supply materials to him.

No reason exists why respondent's vendee, who contracted to supply materials to the prime contractor, cannot be regarded as a "subcontractor" under the Miller Act since so to regard him is i keeping with the purpose and legislative histo of that Act. That understanding of the word ha been accepted by some state courts under analo gous statutes and is consistent with its literal meaning. While in some usages a "subcontrac-tor" and a "materialman" are mutually exclusive, Congress evidently was using "subcontractor" in its other meaning in the Miller Act.

ARGUMENT

THE TERM "SUBCONTRACTOR" AS USED IN THE PROVISO TO SECTION 2 (a) INCLUDES MATERIALMEN; THEREFORE, ONE SUPPLYING MATERIALS UNDER A CONTRACTUAL RELATIONSHIP WITH A MATERIALMAN HAS A RIGHT OF ACTION UPON THE PAYMENT BOND

The Miller Act requires every contractor for the construction of "any public building or public

work of the United States," where the amount of the contract exceeds $2,000, "to furnish to the United States * * * a payment bond with a surety * * * for the protection of all persons supplying labor and materials in the prosecution of the work provided for in said contract for the use of each such person." (Sec. 1 (a) (2), Appendix, *infra*, pp. 17–18.) Here MacEvoy duly furnished such a payment bond with surety, conditioned as required by the Miller Act (R. 4, 16–17). The Miller Act further provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract * * * and who has not been paid in full therefor" within ninety days after the last labor was performed or material supplied, may bring suit on the payment bond for the unpaid balance (Sec. 2 (a), Appendix, *infra*, pp. 18–19).[1] A proviso then states:

> *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship expressed or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from

[1] Suit must be brought in the name of the United States for the use of the person suing, in the Federal court of the district in which the contract was to be performed, and within a year from final settlement under the contract. (Sec. 2 (b), Appendix, *infra*, pp. 19–20.)

> the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

Our view is that this proviso must be accepted as an indication of the types of relationships which Congress intended to include within the protection of the statute. So construed, the Miller Act protects those who furnish labor and materials under contractual relationship with either the prime contractor or his subcontractors. Properly construed, the Act does not impose on the prime contractor or his surety a liability to see that debts of every remote person who supplied labor or material which ultimately found its way into the project, are duly paid.

This conclusion seems to follow from the fact that the evident purpose of the proviso is to require claimants who do not have direct contractual relationship with the prime contractor and of whose claims the latter and his surety would often be unaware, to give notice of the unpaid claim to the prime contractor, thus giving the latter the opportunity of protecting himself by witholding payment from the subcontractor, and of paying the claim without the compulsion of litigation. This purpose is evident also from

the circumstance that the statute requires no such notice from those having direct contractual relationship with the prime contractor and hence of whose claims the latter and his surety would be aware. We cannot think of any reason, nor has any been suggested by the legislative history, why Congress would have wished the notice requirement to be applicable only to some of the more remote creditors benefited by the Act, and not to all. The conclusion therefore seems warranted that Congress intended to require that all claimants under the Miller Act who did not directly contract with the prime contractor should serve notice on him of their claims prior to suit.

The acceptance of this position does not, however, contrary to petitioners' contention, compel acquiescence in the view that respondent is not within the scope of the Act. While the Act so construed will not benefit respondent unless he "had direct contractual relationship with a subcontractor," we believe the view is justified that respondent had such relationship within the meaning of the Act.

The question turns upon whether Miller, to whom respondent sold the goods and who in turn supplied them to the prime contractor, was a "subcontractor." The prime contractor, MacEvoy, had a contract which required it to obtain, supply, and instan certain materials. MacEvoy contracted with Miller for these materials, and Miller in turn contracted with respondent, who supplied

them. Petitioners argue that respondent's rights depend on whether Miller contracted with MacEvoy to perform some act of labor in connection with the materials which MacEvoy itself was contractually bound to do or have done, and unless Miller agreed to perform some labor as well as supply materials it was not a "subcontractor." We believe that this contention should be rejected; it is not required by the language which Congress used and is inconsistent with the known purpose of the Act.

The Act is designed, as was its predecessor the Heard Act, to protect those whose labor and materials go into public projects. Mechanics' liens are unavailable to protect them where public projects are concerned, so the primary liability for their payment is shifted from the owner to the prime contractor. The Heard Act, enacted in 1894 (28 Stat. 278) and amended in 1905 (33 Stat. 811), was the first such federal act. It applied in favor of "all persons supplying [the contractor] * * * with labor and materials in the prosecution of the work provided for in such contract." It was construed liberally for the benefit of those supplying labor and materials (*Standard Ins. Co.* v. *United States,* 302 U. S. 442, 444), and persons supplying labor and materials to subcontractors without themselves contracting directly with the prime contractor were held entitled to its benefits (*Hill* v. *American Surety Co.,* 200 U. S. 197; *Mankin* v. *Ludowici-*

Celadon Co., 215 U. S. 533; *Utah Construction Co.* v. *United States*, 15 F. (2d) 21 (C. C. A. 9), certiorari denied, 273 U. S. 745).[2] No serious doubt would have existed under the Heard Act that respondent was entitled to the benefits of the statute, for no proviso or other provision existed in it to lay a foundation for an argument that suppliers of material to "materialmen" were not benefited though suppliers of material to "subcontractors" were. Neither the language of the Heard Act nor its broad remedial purpose (*Hill* v. *American Surety Co.*, 200 U. S. 197, 205) would have supported the distinction petitioners now seek to read into the Miller Act, and indeed it has been so held (*Utah Construction Co.* v. *United States, supra*).

Nothing in the reasons which prompted Congress to substitute the Miller Act for the Heard Act supports the existence of the distinction petitioners urge. The Heard Act imposed undesirable procedural limitations on its beneficiaries which the Miller Act was designed to eliminate.

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[2] Examples of the liberal construction applied in determining whether claims were for "labor or materials" are decisions allowing recovery for rental of cars, tracks and equipment (*Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376), railroad transportation of materials for the structure (*Standard Ins. Co.* v. *United States*, 302 U. S. 442), groceries and provisions furnished to the contractor for his use in feeding employees on the job (*Brogan* v. *National Surety Co.*, 246 U. S. 257), and cartage and towage furnished to the contractor (*Title Guaranty and Trust Co.* v. *Crane Co.*, 219 U. S. 24).

The Heard Act provided for a single bond for the protection both of the Government and the suppliers of labor and materials, and to prevent the penalty of the bond from being depleted before the Government could enforce its claims the Government had sole right to sue for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. Serious inconveniences and delays resulted and often the claimants, in sore need of immediate funds, were compelled to settle meritorious claims for less than the full amount. Hearings on H. R. 2068, et al., *Bonds of Contractors on Public Works,* House Committee on the Judiciary, 74th Cong., 1st sess.; 79 Cong. Rec. 11702, 13382; H. Rep. No. 1263 and S. Rep. No. 1238 (74th Cong., 1st sess.). The Miller Act was designed to meet these difficulties by requiring that the contractor execute two bonds, a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter without waiting for the Government and even without waiting for completion of the project; they are given the right to sue ninety days after their labor was completely performed or materials fully supplied, and each creditor can sue separately.

It is clear from the Committee reports and the discussion thereon in Congress, that the purpose of the Miller Act was not to restrict in any way the coverage of the predecessor Heard Act, but

rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond. See H. Rep. No. 1263, 74th Cong., 1st sess., p. 1; S. Rep. No. 1238, 74th Cong., 1st sess., p. 1; 79 Cong. Rec. 11702, 13382. And indeed this Court has already recognized the applicability of the policy of liberal construction which it followed under the Heard Act to similar questions arising under the Miller Act. *Fleisher Engineering & Const. Co.* v. *United States,* 311 U. S. 15, 17, 18; cf. *United States* v. *Irwin & Leighton,* 316 U. S. 23, 29, 30. It would indeed be incongruous if the Miller Act, which was substituted for the Heard Act to provide greater protection to unpaid creditors, be interpreted as unavailable to a tier of creditors who were not too remote to invoke the Heard Act. There are indications in the Miller Act itself that its coverage was to be no less broad than that of the Heard Act. The Heard Act provided for suit on the bond by "persons supplying *the contractor* with labor or materials"; while the Miller Act provides for suit by "every person who has furnished labor or material in the prosecution of the work provided for in such contract" (see Appendix, *infra,* pp. 18, 22. And as the Heard Act covered persons supplying materials to a materialman who in turn supplied a contractor (see *Mankin* v. *Ludowici-Celadon Co., supra; Utah Construction Co.* v. *United States, supra*), there would

seem little difficulty in reading the Miller Act, intended merely to correct procedural deficiencies in the Heard Act, as covering such persons.

Nothing in the remedial policy of the Miller Act supports a distinction which causes the protection afforded a supplier of labor or materials to depend on whether the intermediate contractor agreed to supply and also install the materials or merely to supply them. Thus, if MacEvoy had contracted with Miller for the latter to supply sashes, doors and frames and the latter had found it advisable to have those materials milled specially by respondent instead of purchasing standard pre-finished articles, under petitioners' position respondent would have no right to recover for either labor or materials because Miller, as petitioners argue, is not a subcontractor but a materialman. But if Miller had agreed to install the sashes, frames and doors as well as supply them, respondent would be able to recover, petitioners concede, because Miller would then be a subcontractor, not a materialman. It seems evident that the policy of the Miller Act refutes rather than supports such a distinction.[8] Re-

[8] Nor does fairness to the prime contractor require such a distinction. He can easily protect himself against assertion of claims owing but unpaid by materialmen in the same manner that he protects himself against claims owing but unpaid by those who petitioners concede are subcontractors: i. e., by contract with all subcontractors, secured by a bond. See *Hill* v. *American Surety Co.*, 200 U. S. 197, 205; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533, 540.

spondent is, we believe, protected in either instance.

The legislative history on which petitioners rely indicates only that the Miller Act was not intended to benefit relationships more remote than respondent's. (Cf. *Utah Construction Co.* v. *United States, supra,* where the protection of the Heard Act was carried one step further.) Petitioner's main reliance is on the contention that the word "subcontractor" excludes "materialman," and hence respondent, who sold to a materialman, is not within the Miller Act. We submit that the meaning of the word "subcontractor" is not so clearly fixed as necessarily to exclude a materialman. State courts have construed "subcontractor" in comparable statutes to include materialmen (*Holt and Bugbee Co.* v. *City of Melrose,* 311 Mass. 424, 41 N. E. (2d) 562; *McNab & Harlin Mfg. Co.* v. *Paterson Bldg. Co.,* 72 N. J. Eq. 929, 67 Atl. 103). It is true that numerous state decisions indorse the contrary view (see Annotation, 141 A. L. R. 321, 324, for a summary of the conflicting cases) but if the word can have either of two meanings the one consistent with the purpose of the statute should

be selected. As there is judicial endorsement of both meanings[4] the conclusion seems warranted that a materialman can be a "subcontractor" where, as here, that construction is consistent with the purpose and sense of the statute.

It has not been suggested that literally a materialman cannot be a "subcontractor," and clearly if literal meaning be sought a materialman is merely a particular type of subcontractor. The contention is made, however, that in the construction business the two words are mutually exclusive. We assume that this usage exists, but there is no indication that Congress knew of it when the Miller Act was enacted. The Hearings (*supra*, p. 11) show that the committee that drafted and reported the bill, the Judiciary Committee, had its customary membership of attorneys, and most of the witnesses before the committee were attorneys. The Procurement Division of the Treasury Department was consulted through its attorneys, who

[4] Not without significance is this Court's interchangeable use of "subcontractor" and "materialman" in referring to one who merely supplied materials, in *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, under the Heard Act.

submitted amendments. The committee bill (H. R. 8519, 74th Cong., 1st sess.) became law without amendment. Accordingly, we submit that it may not be assumed that Congress used words with the peculiar meaning attached to them by the construction business when so to assume would result in giving the statute a meaning its purpose and legislative history show it was not intended to have.[8]

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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[8] That Congress has itself recognized that the term "subcontractor" may, standing alone, include materialmen is to be seen from Sec. 301 (a) (3) of the Act of December 2, 1942 (56 Stat. 1035, 42 U. S. C. Supp. II, § 1651 (a) (3)), explicitly providing that the provisions of the Act shall not apply to employees of a "subcontractor who is engaged exclusively in furnishing materials or supplies."

APPENDIX

THE MILLER ACT

1. The Miller Act (Act of August 24, 1935, c. 642, 49 Stat. 793–794; 40 U. S. C. 270a–270d) provides:

AN ACT REQUIRING CONTRACTS FOR THE CONSTRUCTION, ALTERATION, AND REPAIR OF ANY PUBLIC BUILDING OR PUBLIC WORK OF THE UNITED STATES TO BE ACCOMPANIED BY A PERFORMANCE BOND PROTECTING THE UNITED STATES AND BY AN ADDITIONAL BOND FOR THE PROTECTION OF PERSONS FURNISHING MATERIAL AND LABOR FOR THE CONSTRUCTION, ALTERATION, OR REPAIR OF SAID PUBLIC BUILDINGS OR PUBLIC WORK

SEC. 1. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work

provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

SEC. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him on material was furnished or supplied by him for which such claim is made, shall have the right to sue

on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States

shall not be liable for the payment of any costs or expenses of any such suit.

SEC. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

SEC. 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

SEC. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C. title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act

takes effect, and to persons or bonds in respect of such contracts.

THE HEARD ACT

2. The Heard Act (Act of August 13, 1894, c. 280, 28 Stat. 278) as amended (Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. 270) provided:

> any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed

pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to

all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further,* That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

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U. S. GOVERNMENT PRINTING OFFICE, 1944

SUPREME COURT OF THE UNITED STATES.

No. 483.—October Term, 1943.

Clifford F. MacEvoy Company and the Aetna Casualty and Surety Company, Petitioners, *vs.* United States of America for the Use and Benefit of the Calvin Tomkins Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 24, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

The United States entered into a contract with the petitioner Clifford F. MacEvoy Company whereby the latter agreed to furnish the materials and to perform the work necessary for the construction of dwelling units of a Defense Housing Project near Linden, New Jersey, on a cost-plus-fixed-fee basis. Pursuant to the Miller Act,[1] MacEvoy as principal and the petitioner Aetna Casualty and Surety Company as surety executed a payment bond in the amount of $1,000,000, conditioned on the prompt payment by MacEvoy "to all persons supplying labor and material in the prosecution of the work provided for in said contract." The bond was duly accepted by the United States.

MacEvoy thereupon purchased from James H. Miller & Company certain building materials for use in the prosecution of the work provided for in MacEvoy's contract with the Government. Miller in turn purchased these materials from the respondent, Calvin Tomkins Company. Miller failed to pay Tomkins a balance of $12,033.49. There is no allegation that Miller agreed to perform or did perform any part of the work on the construction project. Nor is it disputed that MacEvoy paid Miller in full for the materials.

Within ninety days from the date on which Tomkins furnished the last of the materials to Miller, Tomkins gave written notice to MacEvoy and the surety of the existence and amount of Tom-

[1] Act of August 24, 1935, c. 642, 49 Stat. 793; 40 U. S. C. § 270a *et seq.*

kins' claim for materials furnished to Miller. Tomkins as use-plaintiff then instituted this action against MacEvoy and the surety on the payment bond. The District Court granted petitioners' motion to dismiss the complaint for failure to state a claim against them. 49 F. Supp. 81. The Circuit Court of Appeals reversed the judgment. 137 F. 2d 565. We granted certiorari because of a novel and important question presented under the Miller Act. 320 U. S. 733.

Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot.

The Heard Act,[2] which was the predecessor of the Miller Act, required Government contractors to execute penal bonds for the benefit of "all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract." We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced "the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work." *United States for the Use of Hill* v. *American Surety Co.*, 200 U. S. 197, 204. See also *Mankin* v. *United States for the Use of Ludowici-Celadon Co.*, 215 U. S. 533; *United States Fidelity & Guaranty Co.* v. *Bartlett*, 231 U. S. 237; *Brogan* v. *National Surety Co.*, 246 U. S. 257; *Fleishmann Construction Co.* v. *United States to the Use of Forsberg*, 270 U. S. 349; *Standard Accident Insurance Co.* v. *United States for the Use and Benefit of Powell*, 302 U. S. 442. We accordingly held that the phrase "all persons supplying [the contractor] . . . with labor and materials" included not only those furnishing labor and materials directly to the prime contractor but also covered those who contributed labor and materials to subcontractors. *United States for the Use of Hill* v. *American Surety Co.*, *supra*, 204; *Mankin* v. *United States for the Use of Ludowici-Celadon Co.*, *supra*, 539; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380. We had no occasion, however, to determine under that Act whether those who merely sold materials to materialmen, who in turn sold them to the prime

[2] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. § 270.

contractors, were included within the phrase and hence entitled to recover on the penal bond.[3]

The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries.[4] There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond. Section 1(a)(2) of the Miller Act requires every Government contractor, where the amount of the contract exceeds $2,000, to furnish to the United States a payment bond with a surety "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each said person." Section 2(a) further provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract" and who has not been paid in full therefor within ninety days

[3] In United States for the Use of Hill v. American Surety Co., 200 U. S. 197, 204, we said, "There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for." This broad language, which went beyond that required by the facts and the holding in that case, might seem to justify recovery by persons supplying materials to materialmen. Such was the holding in Utah Construction Co. v. United States, 15 F. 2d 21. Our denial of certiorari in that case, 273 U. S. 745, was not a determination by us of the issue, however. Compare Continental Casualty Co. v. North American Cement Corp., 91 F. 2d 307, expressing the opposite opinion under an identical District of Columbia statute.

[4] Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. Serious inconveniences and delays resulted. The claimants, often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties by requiring that the prime contractor execute two bonds—a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied. Hearings on H. R. 2068, et al., Bonds of Contractors on Public Works, House Committee on the Judiciary, 74th Cong. 1st Sess.; 79 Cong. Rec. 11702, 13382; H. Rep. No. 1263 and S. Rep. No. 1238 (74th Cong., 1st Sess.).

after the last labor was performed or material supplied may bring suit on the payment bond for the unpaid balance. A proviso then states:

"*Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made. . . ."

The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. *Fleisher Engineering & Construction Co.* v. *United States for the Use and Benefit of Hallenbeck*, 311 U. S. 15, 17, 18; cf. *United States to the Use of Noland Co., Inc.* v. *Irwin*, 316 U. S. 23, 29, 30. But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. Ostensibly the payment bond is for the protection of "all persons supplying labor and material in the prosecution of the work" and "every person who has furnished labor or material in the prosecution of the work" is given the right to sue on such payment bond. Whether this statutory language is broad enough to include persons supplying material to materialmen as well as those in more remote relationships we need not decide. Even if it did include such persons we cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of Section 2(a). However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

The proviso of Section 2(a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contrac-

tor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act.[5] Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants.

The ultimate question in this case, therefore, is whether Miller, the materialman to whom Tomkins sold the goods and who in turn supplied them to MacEvoy, was a subcontractor within the meaning of the proviso. If he was, Tomkins' direct contractual relationship with him enables Tomkins to recover on MacEvoy's payment bond. If Miller was not a subcontractor, Tomkins stands in too remote a relationship to secure the benefits of the bond.

The Miller Act itself makes no attempt to define the word "subcontractor." We are thus forced to utilize ordinary judicial tools of definition. Whether the word includes laborers and materialmen is not subject to easy solution, for the word has no single, exact meaning.[6] In a broad, generic sense a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor. In that sense Miller was a subcontractor. But under the more technical meaning, as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen. To determine which meaning Congress attached to the word in the Miller Act, we must look to the Congressional history of the statute as well as to the practical considerations underlying the Act.

It is apparent from the hearings before the subcommittee of the House Committee on the Judiciary leading to the adoption of the Miller Act that the participants had in mind a clear distinc-

[5] "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H. Rep. No. 1263 (74th Cong., 1st Sess.), p. 3.

[6] In analogous situations, state and lower federal courts have expressed divergent opinions as to whether the word "subcontractor" includes laborers and materialmen. See annotation in 141 A. L. R. 321 for a summary of the conflicting cases. We have not heretofore had occasion to define the word in this connection. Any loose, interchangeable use of "subcontractor" and "materialman" in any prior decision of ours is without significance.

tion between subcontractors and materialmen. In opening the hearings, Representative Miller, the sponsor of the bill that became the Miller Act, stated in connection with the various proposed bills that "we would like to have the reaction and opinion of members in reference to those bills that deal with the general subject of requiring a bond for the benefit of laborers and materialmen who deal with subcontractors on public works."[7] And the authoritative committee report[8] made numerous references to and distinguished among "laborers, materialmen and subcontractors." Similar uncontradicted statements were made in both houses of Congress when the Act was pending before them.[9] The fact that subcontractors were so consistently distinguished from materialmen and laborers in the course of the formation of the Act is persuasive evidence that the word "subcontractor" was used in the proviso of Section 2(a) in its technical sense so as to exclude materialmen and laborers.[10]

Practical considerations underlying the Act likewise support this conclusion. Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to

[7] Hearings on H. R. 2068, et al., Bonds of Contractors on Public Works, House Committee on the Judiciary, 74th Cong., 1st Sess., p. 1. See also statements by Rep. Miller, id., pp. 18, 26, 60, 67, 74; Rep. Robsion, p. 30; Rep. McLaughlin, p. 73; Rep. Dockweiler, pp. 12-22; Rep. Celler, pp. 83, 84, 89; Edward H. Cushman, pp. 23-31, 85.

[8] H. Rep. No. 1263 (74th Cong., 1st Sess.), pp. 1, 2.

[9] Rep. Miller stated in the House that "This bill merely provides that in the construction of public buildings and other public works there shall be two bonds, one for the performance of the contract with the Government, and the other a payment bond for the protection of subcontractors and those furnishing the labor and material. Under the present law we have but one bond, with a dual obligation, but it is not satisfactory in that it does not afford protection to the subcontractors, materialmen, and laborers. This merely provides for two bonds, one for the protection of the Government's interests, and the other for the protection of the rights of labor, the subcontractors, and material furnishers." 79 Cong. Rec. 11702.

Sen. Burke said in the Senate that "This bill would amend that law by requiring an additional bond, a payment bond, for the protection of material men and laborers, subcontractors, and all who put forth their labor or furnish materials or incur expenditures in connection with the work." 79 Cong. Rec. 13382.

[10] See, in general, Campbell, "The Protection of Laborers and Materialmen Under Construction Bonds," 3 Univ. of Chicago L. Rev. 1; Annotation, 77 A. L. R. 21.

him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. *United States for the Use of Hill* v. *American Surety Co., supra,* 204; *Mankin* v. *United States for the Use of Ludowici-Celadon Co., supra,* 540. But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer.[11] Many such materialmen are usually involved in large projects; they deal in turn with innumerable sub-materialmen and laborers. To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative.[12] Here the proviso of Section 2(a) of the Act forbids the imposition of such a risk, thereby foreclosing Tomkins' right to sue on the payment bond.

The judgment of the court below is

Reversed.

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[11] See Note, "The Widening Scope of Protection of Statutory Construction Bonds," 45 Harvard L. Rev. 1236.

[12] Congress has shown its ability in other statutes to make clear an intent to include materialmen within the meaning of the word "subcontractor." See Sec. 301(a)(3) of the Act of Dec. 2, 1942, 56 Stat. 1035, 42 U. S. C. Supp. II, § 1651(a)(3), providing that the provisions of the Act shall not apply to employees of a "subcontractor who is engaged exclusively in furnishing materials or supplies." In other statutes, Congress has clearly used the term "subcontractor" in contrast to "materialman." See 40 U. S. C. § 407(b); 41 U. S. C. § 10b(a) and (b); 41 U. S. C. § 28.